IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION MDL 2406

CASE NO.: 2:13-cv-20000-RDP

VOLUME I

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MOTION HEARING

FOR FINAL APPROVAL OF CLASS SETTLEMENT

OF SUBSCRIBER PLAINTIFFS' CLAIMS

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BEFORE THE HONORABLE R. DAVID PROCTOR, UNITED STATES DISTRICT JUDGE, at Birmingham, Alabama, on Wednesday, October 20, 2021, commencing at 10:12 a.m.

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Proceedings reported stenographically;
transcript produced by computer.

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(The following proceedings were heard before the Honorable R. David Proctor, United States District Judge, at Birmingham, Alabama, on Wednesday, October 20, 2021, commencing at 10:12 a.m.:)

THE CLERK: Come to order, please, and remain seated.

THE COURT: Have a seat. Good morning, everyone.

COUNSEL IN UNISON: Good morning, Your Honor.

THE COURT: All right. Well, we have a number of things to accomplish over the next two days.

We're here in In Re: Blue Cross Blue Shield Antitrust Litigation, MDL Number 2406, our Case Number 13-cv-20000. The Court set today as the -- and tomorrow -- and I think tomorrow will be necessary from what I can tell -- as the dates we would conduct a fairness hearing in this case.

The Court has preliminarily approved a settlement that involves the settlement of the subscribers' side of the case. The Court entered a preliminary approval order about 11 months ago, I think it was. And obviously, in light of the 2018 amendments, the Court did try to frontload as much information into that portion of the settlement approval process as possible and did rigorously review the settlement on a preliminary basis.

Having said that, my view is that we're starting from scratch today. There is no -- there's no thumb on the scale. There's no inclination toward approval of the settlement. And I think the proponents of the settlement have to establish the

requirements of Rule 23(e) and Eleventh Circuit case law.

As far as the basics of things, I'm being guided by the *Bennett* factors that I think are still in play but emphasizing, maybe, the Rule 23(e) factors that were input into the amendments in 2018. I don't think those make a big difference. I think that analysis, regardless of which way you articulate it, is pretty similar.

We'll start with the proponents of the class settlement or the class settlements. And I understand that there's three different classes, a (b)(2) injunctive relief class that involves indivisible injunctive relief, a (b)(3) damages class, and a Rule 23(b)(3) what I would refer to as divisible injunctive relief, but -- and I don't think it matters how we characterize it, but that's the way I'm thinking about it.

As far as things that I want to make sure we touch base on, there will be a number of those. I'm going to give you five, but this is by no means the limit of things I'm concerned about or have questions about. I'm just wanting to hear your arguments about.

First is ESAs and post-settlement structure, the effect of continuing ESAs, the discontinuance of national best efforts and the modification of local best efforts, and any other terms that the settlement affects in terms of the Blue Cross Blue Shield business structure going forward.

Second, the divisible injunctive relief issue, how the second Blue bids were formulated, adequacy of representation that's been raised by some of the objectors with respect to that part of the self-funded class settlement, or ASO settlement, the class period that relates to that particular class settlement, the allocation between the -- of money damages or monetary relief, I should say, between the two groups.

Who's here for the Department of Labor? Anybody?

That's interesting. At 5:56 p.m. last night, we received a filing from the Department of Labor asking to appear as an amicus curiae. I guess I'll hold off on my explanation of what the difference is between a friend of the Court and an enemy of the settlement, but I tend to think that the Department of Labor is a governmental objector, not an amicus curiae.

Anybody have a different view of that than me? Okay.

But I do think we'll need to address that. And I suspect the proponents of the settlement would like the opportunity to respond to that belated brief that came in. Am I right?

MR. BOIES: Yes, we would, Your Honor. I do think -- the only thing that I would say is that with respect to whether they're an objector or not, they have made clear that they're expressing certain concerns; but they have not, at least up till now, objected to the settlement.

THE COURT: Right. Well, I think last night tended to

be an objection. Whether it was timely or not is an issue. You know, I think counsel may have questions about the Court over the years, but one of the things I don't think you have a question about is I tend to not go into form over substance. And if it's a legitimate question that needs to be asked about the settlement, I think it's fair game for the Court to consider.

I'm a little -- I thought -- maybe I'm misrecollecting, because I've reviewed a lot of materials over the last -- in advance of preparing for this. I thought they requested the opportunity to speak at the hearing. Maybe I'm misrecollecting that. In any event --

MR. BOIES: They may have, Your Honor. I don't recall that, but they may have.

THE COURT: All right. Maybe they were just asking for the opportunity to be heard in terms of the written -- all right.

I will want the parties to address that. I don't know if we're going to get to it today or if it will be tomorrow, but I've got some questions about the DOL concerns.

And the other thing I would note regarding what I reviewed based upon the filing yesterday evening is that it seems to me their positions have slightly morphed from concerns about the settlement to actual arguments and objections about the settlement in terms of adequacy of representation and

legality of some of the provisions of the settlement. So I think we'll have to address those.

Let me ask this. Is there anyone here who thinks that that's not a good starting point or a good list of starting points of things the Court ought to be concerned about? I -- and that's not to say that I'm not concerned about other issues. I know that some of the issues raised are rifle shots rather than shotgun blasts, and I haven't tried to include those here. But I have tried to get and address some of the more fundamental questions that I think we're going to have to take up.

For example, the Prairie Island Indian Community I think has some concerns that we need to address, but I've not included that on my preliminary list here because I think we're going to necessarily get to that when they state their objection. I'm not sure that's something that proponents of the settlement, though, are going to want to frontload in their presentation. They might just choose to address that when it comes up and as it comes up. All right?

Anyone want to be heard on that as far as what balls our eye should be on going into this?

Hearing nothing, I think we have a satisfactory list.

I think it's now time for the settlement proponents to make their presentations. And I understand counsel have negotiated a little bit about the agenda, which was -- every agenda I put out -- an outline more than a mandate. That's just

something to guide us through these issues in an orderly way. But I'm going to leave it to counsel and the way they've worked it out to present what they want to present; and if I think you need to back up and cover something or you've missed something, I'll certainly bring it to your attention. All right?

Everyone ready to get started? Mr. Boies?

MR. BOIES: Thank you, Your Honor.

I will see if we can get our charts up on the screen. I might begin by giving the Court just an overview of our planned presentation. I'm going to begin with some background information and then go to responses to the objections. And we've divided those responses by the type of objection by the objectors. Part one, the so-called Sperling and Slater objections and national account objectors. And we will go through these first --

THE COURT: Let's pull that microphone a little closer to you.

MR. BOIES: Thank you.

THE COURT: Appreciate your masking up. You don't have to mask up when you're speaking. I'm going to leave it to your discretion. We'll keep you socially distanced while you're sitting there.

MR. BOIES: Thank you, Your Honor.

THE COURT: All right.

MR. BOIES: That will help.

And the second --

THE COURT: And that goes for everyone else who is speaking. When you're speaking, if you would prefer to remove your mask or if we're having difficulty hearing you, we'll suggest that.

MR. BOIES: Then the second part will be the so-called ASO subclass issues, the Bradley Arant objectors. And in each case, what we'll do is we'll make our presentation, they'll have an opportunity to make their presentation, and then we and the defendants can respond.

And then on the second day, there will be the responses to the objections relating to monetary relief, notice, plan of distribution and claims process, attorneys' fees and expenses, and any additional objections. And we will also try to deal at that time with the Department of Labor concerns. And I would say to the Court that we are continuing in conversation with the Department of Labor about their concerns.

THE COURT: So you're talking to them; I'm just not able to.

MR. BOIES: We have -- we have been communicating. And they may choose to communicate with the Court if our communications are not successful.

THE COURT: Fair enough.

MR. BOIES: But their concerns have been to be sure that when the money is distributed, people are aware of what

their ERISA obligations are with respect to those funds. And we're trying to cooperate in terms of making sure that those people are given the kind of notice that the Department of Labor thinks they should be given. And I'm hopeful that we'll be able to work that out, but you never can tell.

THE COURT: Well, I had some soul-searching to do in 2012 when I was asked to take this case. If you would have told me then that ERISA was going to become a part of it, I'm not sure I would have had the same response. And maybe some people are now saying to themselves, if only we had mentioned ERISA back then.

MR. BOIES: Well, if I had known it would be an ERISA case, Mr. Hume might have been spending more time on this than I have.

The next thing I want to do is I want to go through a little bit of a history of the case and sort of how we got here. And as the Court is aware, we -- and just indicated this litigation was filed in 2012; but I think in terms of background, it's useful to keep in mind that the core features of what we've challenged here have been public knowledge for decades, going all the way back to 1946. Blue Cross Blue Shield executives described their system as a system in which, quote, only one Blue Cross plan is established in each enrollment area. In 1971, just as an example, the Blue Cross president testified before a Senate antitrust subcommittee and testified expressly

about the fact that the Blue plans had, quote, exclusive territorial arrangements. In 1979, a report by the Federal Trade Commission reported, quote, Blue Shield plans generally do not compete with each other, closed quote.

And as I think the Court is aware from the many years of this litigation, those kind of public statements, those kind of public acknowledgments about the restraints that we have challenged in this case were very public, very well known, known to all the major participants in this industry, known to the Department of Justice, known to the Federal Trade Commission. And yet there was never any challenge. The Department of Justice didn't challenge it. The Federal Trade Commission didn't challenge it. And none of the very large corporations, including some of the corporations that you're going to hear from today, challenged it. It was not that people were not aware of the restraints. It was not that they did not have resources to challenge those restraints if they had chosen to. They simply didn't.

And I think that in thinking about some of the objections that are made in terms of we should have gotten more money, we should have gotten more injunctive relief, I think it is useful context to keep in mind that until we brought this case in 2012, no one was seeking that injunctive relief. No one was seeking those damages.

I think it's also useful to keep in mind -- because the

Court is going to hear today and tomorrow about a number of views by ASO participants -- that even after we filed this case in February of 2012 -- and as the Court will recall, the case that we originally filed did not assert claims on behalf of ASOs. It only asserted claims on behalf of insured individuals and groups.

THE COURT: What do you say in response to one of the objectors that said the class definition in *Cervin* necessarily encompassed ASOs?

MR. BOIES: We think it's clear it did not. We think it's clear from the language, but it's also absolutely clear from the context of the litigation.

Throughout the litigation, we made clear that it was only the fully insured. And indeed, the Court will recall that our complaint -- until it was expanded in the last couple of years, our complaint was limited not merely to fully insured plans, but was limited to individuals and small groups so that it was absolutely clear that ASOs were not included. And indeed, when the complaint talks about ASOs, it talks about why they are not in the market, why they are distinguishable from the fully insured plans.

So I don't think that you can in any way fairly read either the actual text of the complaint itself or the conduct of this litigation as including the ASOs.

THE COURT: So what you're saying is that even putting

aside what -- how one would interpret the *Cervin* scope of the class definition in the complaint, if you read in context the *Cervin* complaint and particularly the master complaint, it was clear that you were seeking to represent the class that you're actually representing now, not a broader class.

MR. BOIES: That is correct, Your Honor, until the amended complaint was filed.

THE COURT: Until the amended complaint. That's what I -- and technically, Mr. Burns is representing that group; right?

MR. BOIES: He is the subclass counsel.

THE COURT: All right.

MR. BOIES: Obviously, we've been representing the entire class.

THE COURT: One of the things that I recall was fairly early on, when I had you and Mr. Laytin and Mr. Zott in chambers one time, we got into a discussion about the scope and size of the class. And at that point, you were contending it was a much smaller class than the Blues were interpreting it or advocating the concern about it. I think it -- so -- and I think -- I do recall that.

MR. BOIES: Yes. They believed that -- and with sensible reasons -- that if we were going to have a settlement that would substantially increase competition, it was necessary to bring in the entire marketplace.

THE COURT: Right.

MR. BOIES: We had originally started off with a much narrower approach because we thought that would expedite things, but as we got into it --

THE COURT: I bring that up not -- and I do understand that you did broaden the class because, as I recall, you also characterized at one point this settlement as heavier on injunctive relief emphasis than monetary relief, even though it's substantial monetary relief that you claim you've negotiated with the class. But prior to that, I think that's consistent with your position that you didn't view the *Cervin* complaint as seeking to represent ASOs. That was never the intent of class counsel, and it still wasn't the intent up until the time the subclass was alleged in the amended complaint.

MR. BOIES: I think that's -- I think that's fair, Your Honor.

THE COURT: All right.

MR. BOIES: Now, in part because of the fact that no one had challenged these restraints previously and in part because of the enormous resources and abilities of defendants and their counsel, the litigation of this case, as I think the Court is aware, has been an enormous undertaking.

THE COURT: Yes. I think you do need to establish that for the record, but I don't think you need to convince me of it.

MR. BOIES: I mean, the Court will recall that we have

incurred more than $35 million in out-of-pocket costs. We have devoted approximately $200 million in lodestar, and that is at some discounted rates. We've had to review over 75 million documents and terabytes of data, the production of which required substantial litigation across 36 different defendants.

THE COURT: I am curious about your icon in the upper right corner of this slide. What exactly is that?

MR. BOIES: That's -- that's a really good question, Your Honor. The --

THE COURT: For some reason, I think I'm asking the wrong person about the graphics.

MR. BOIES: Yeah. The icons on this document were put on by people considerably younger than myself.

THE COURT: And more talented?

MR. BOIES: And more talented. Considerably more talented in putting on icons.

THE COURT: At least in that area.

MR. BOIES: We also -- and I guess -- I guess, as I sort of look at this, I think that is supposed to be a deponent.

THE COURT: Raising his hand and being sworn in, perhaps.

MR. BOIES: Raising his hand and being sworn in, because it is sort of connected to the observation that we had taken over 120 offensive depositions as well as 16 class representative depositions.

THE COURT: "Offensive" meaning you took them, not that you were offensive during them.

MR. BOIES: Hopefully, Your Honor, yes, by offensive, we mean they were part of our affirmative case as opposed to our defense case.

As this Court will remember, I'm sure we've had over a hundred status conferences, discovery conferences, and other hearings, for which we greatly appreciate the Court's attention to this matter, particularly --

THE COURT: And we should give Judge Putnam a lot of credit for that. He's now retired from our magistrate judge team --

MR. BOIES: Yes.

THE COURT: -- but he did -- regardless of how this particular issue works out, we would all acknowledge he just did yeoman's work.

MR. BOIES: He did a terrific job. And we appreciate, you know, his attention to this as well as Your Honor's, particularly -- and I might say particularly during the last two years where, although a lot of cases, in my experience, stalled over the last two years, this case really kept going. And we very much appreciate the Court and Judge Putnam and the efforts of the special master in making sure that that happened.

There have been over a hundred discovery motions and briefs and 91 discovery orders. We have had to review and

challenge over 700,000 privilege log entries, resulting in 45 orders concerning privilege issues. And as the Court is aware, we succeeded in successfully challenging a very large number of privileges, which have resulted in some very important evidence that we have submitted. But that was something that took an enormous amount of time and attention and resources.

There have been multiple rounds of briefings on motions to dismiss. I think that the Court is well aware and I would acknowledge the tremendous effort that the defense counsel have made in terms of defending their clients in this case.

There has been summary judgment briefing and hearings including on filed rate and standard of review. We've had two days of economic testimony where we brought to the Court and prepared eminent economists to testify about the economic issues that were presented by this litigation.

There has been briefing and expert discovery on class certification, including two expert reports on class certification and five merits expert reports and related discovery.

I say that because I think it's important to understand how hard this road has been, how long this road has been when we take into account what we've accomplished. And while this litigation has already lasted nine years, if this case were to proceed to trial, the costs in time and uncertainty would continue.

And one of the things that younger people do is they prepare these charts so that the chart doesn't all come up at once. I think they think that that makes it more dramatic or something.

But we would face substantial uncertainty as to class certification, which has not yet been granted, liability, damages, the scope of injunctive relief. And as the Court is aware, we have 51 nonaccelerated actions, which would involve additional risk, additional time.

One of the things that I think is attractive about this settlement is that it provides not only some substantial monetary recovery, but really dramatic injunctive relief that will change the character of this industry. And the faster that that happens, the sooner the benefits of competition will inure to the benefit of our class members.

And I think that one of the advantages of this settlement that we need to keep in mind is that it gets us to that injunctive relief years, many years, faster than we could get by litigation. And I think that when you think about what we've accomplished, not only have we accomplished a dramatic change in the health care insurance market, but we have done so today, or at least once this gets approved and any objections get resolved; but as soon as that happens, the benefits of this increased competition can begin. And so I think that the advantage of doing this by settlement, as opposed to wading

through all that we'd have to do in terms of litigation, is something that needs to be taken into account.

Now, in terms of an overview of the settlement, the financial relief is $2.67 billion. And in addition to that -- and as the Court has said before and as I have said to the Court before, more important than the money -- and the money is a substantial amount, but much more important than the money is the structural relief that this settlement brings.

It eliminates the national-best-efforts restraint. And that restraint, of course, was the restraint on Blue plans competing with each other outside of their exclusive service areas, even if they didn't use the Blue trademark. And I -- I said to the Court early on that I thought that that was the most important and the most egregious restraint.

You know, whatever the justifications were for the exclusive service areas as applied to protecting integrity of trademarks, that did not apply when you were talking about restraints on what we've sometimes in this case referred to as green competition. We've also limited the use of MFN differentials. We've limited acquisition restrictions and other new rules.

THE COURT: Can you brief -- just particularly for the benefit of those who may be watching or listening from outside the courthouse today -- I take it most people in the courtroom today understand the limits on the use of MFN differentials, but

would you just give us a summary of that?

MR. BOIES: Sure, Your Honor.

One of the restraints that we thought was anticompetitive was the way the Blues used most-favored-nation agreements to enable them to have a differential, an advantage over their competitors. And there were some states in which there were laws against that, but there were many states in which there were not laws against that.

And one of the things that we sought, really, from the beginning of this litigation was to limit the use of these most-favored-nation differentials so that there would be a more level playing field in terms of competition and in terms of entry as well. And I think that is a -- I think that is an important accomplishment. I think it is not at the same level as the elimination of the so-called national-best-efforts restraint. I think the elimination of the national-best-efforts restraint is really a core element of the structural relief. But the limits on the use of most-favored-nation differentials I think is very positive and goes with the elimination of the national-best-efforts restraint to improve competition.

And I would note that the limits on the use of the most-favored-nation differentials applies even to just their Blue business. That is, even with respect to the business using the Blue trademark in exclusive service areas, they are still going to be limited as to the use of most-favored-nation

differentials.

We also, as I indicated a moment ago, limited acquisition restrictions and limited the imposition of new rules that would try to perhaps bring back some of these restraints in a different guise. We also set up a monitoring and reporting regime for five years that will help to ensure the success of these efforts to increase competition.

Now, the last major piece of structural relief was the right to request an additional Blue bid. As I said, the center of what we were doing was to try to eliminate the restrictions on so-called green competition, but we also wanted to enhance a competition even between Blue plans using the Blue trademark. And I think maybe it's useful to just spend a moment on this, given the questions that the Court raised.

This was a heavily and aggressively, I think I can say, negotiated issue. The defendants did not want any additional Blue bids. And they had a number of very serious arguments as to why they should not have to have any competition between the individual Blue plans that were part of the Blue system. We wanted to secure additional Blue bids. And I think in an ideal world, we would have tried to secure a second Blue bid for any large ASO that had employees dispersed among different states or regions.

The provision that we have in the settlement agreement is the result of a hard-fought compromise. And I think the

special master and mediator can attest to the difficulty of reaching this compromise. In that compromise, the defendants agreed to provide an additional Blue bid to ASOs with a total of approximately 31 million covered lives.

To have the greatest procompetitive impact of the second Blue bids or additional Blue bids, we specified that those additional Blue bids would be provided to those ASOs with more than 5,000 employees and the greatest dispersion. And by "dispersion," we mean the dispersion of employees into different regions or states.

The effectiveness of a second Blue bid and the impact of a second Blue bid is obviously greatest for those companies that are larger and that have the employees dispersed among a number of states. And the 31 million lives represents about half of all lives covered by ASOs with more than 5,000 employees and a larger share of ASOs with employees in multiple service areas.

Now, in the settlement as originally presented, we presented this second-Blue-bid injunctive relief as part of the (b)(2) injunctive class. We did that for a number of reasons.

THE COURT: And I think I told everyone early on, just as a heads-up at the last status conference, that I had some serious concerns about that being classified under (b)(2) with no opt-out right and the potential burden that might have on the opt-out right.

MR. BOIES: You did, Your Honor. And we took that -- that comment very seriously, which is -- which is why we are now proposing that that relief be part of a (b)(3) class with opt-out rights.

THE COURT: And to be clear -- so I taught complex civil litigation at Alabama and Cumberland, and I've taught multi-district litigation at Georgia, Miami, and Tennessee. And I've always just kind of divided the universe of class relief into two halves, divisible and indivisible relief. Monetary damages clearly falls into divisible. Different class members may, in fact, get different monetary awards based upon this settlement administration, if this settlement is approved. That's typically the case -- not always the case but typically the case.

Injunctive relief generally, particularly when it's across the board, tends to be indivisible. You can't break up an injunction to benefit some and not benefit others. But because of the unique feature of this structural relief, I think it is divisible. Disagree?

MR. BOIES: I don't, Your Honor.

THE COURT: Some will benefit from second Blue bids; some will not.

MR. BOIES: I think that's right. As Professor Rubinfeld says and as we have said in our papers, we think the additional Blue bids to a large number of ASOs will drive

innovation and price reductions that will benefit the entire health insurance market generally and all ASOs in particular.

However, we also recognize that the effect is differentiated. And after the Court raised the issue, not only did we think about it, but we also looked at some of the recent case law that talks about injunctive relief that is divisible or individualized. And I think that having done that, I think we're more -- we agree with the Court that it is better that this relief be in a (b)(3) class than in a (b)(2) class.

THE COURT: So I'm going to -- I don't want to jump you ahead because I think you're going to address this, based upon my skimming of your materials, but I think that will affect probably the requirement for a supplemental notice to ASOs.

MR. BOIES: We believe that as well, Your Honor, that there -- although there was some opportunity for people to opt out and the long-form notice --

THE COURT: In fairness, they ought to be given a second chance with this knowledge because before, they would have said if I opt out, I don't get the benefit of the (b)(2) relief. Now, if this -- if your proposal stands firm -- and I think the Blues are shoulder to shoulder with you on this, and I think Mr. Burns is as well. But if this proposal stands, then an ASO could opt out for (b)(3) purposes as to monetary damages and divisible injunctive relief. They would, of course, remain in a (b)(2) class because there's no opt-out right from an

indivisible-relief (b)(2) class.

MR. BOIES: I think that that's exactly right, Your Honor. And I believe that -- as I say, while I think the prior notice could have been interpreted for people to understand they had an opportunity to do that, I agree with the Court that it was not as clear as it could have been. And I think in fairness, they ought to be given now an explicit opportunity. The ASOs should be given an explicit opportunity to opt out.

THE COURT: Which -- did an objector raise this? Did this come up from the parties? Was it a combination of things?

MR. BOIES: I think it was a combination of things. I don't know that the objectors raised this exactly, but I think it underlies a number of the objections. It is something that the Court raised with us earlier as well. But I think a combination of our going back and looking at it in light of some of the recent case authority, the comments that the Court made, the comments that objectors have made -- I think all of that led us both to conclude, first, that it should be in a (b)(3) class and --

THE COURT: Well, I thought it would be important to notify or give some indication on the record that I did raise that, because I'm not sure -- at that point, I didn't know who the objectors were or what their objections would be.

MR. BOIES: Right.

THE COURT: They might have been filtering in, but I

didn't focus on the objections until the deadline.

MR. BOIES: Correct.

THE COURT: And they obviously would not have had the benefit of being at a status conference in New York a month-plus ago. So I just thought it would be important for us to just acknowledge on the record I'd raised a concern about this fairly early on.

MR. BOIES: Yes. And after you did, as I said, Your Honor, and even before we began addressing the objections, we went back and we looked at it. And as I say, we concluded, first, that it should be in the (b)(3). And once we concluded that it should be in (b)(3), we then thought a lot about whether we needed to have supplemental notice to give the ASOs an opportunity to opt out, and we ultimately concluded that that was the better thing to do.

And I think that that is something that both the defendants and we are now in agreement on, that under all the circumstances -- and I don't want to speak for the defendants. They'll speak for themselves. But certainly we have concluded that the better approach, given the fact that it's going to be in the (b)(3) class, given the fact that the original notice did not make that explicit, that the right thing to do is to have supplemental notice. And an advantage of that is that it does address a number of the objections.

I think it's also worth, just as part of the

introduction, to note that the accomplishments of this settlement have been recognized, you know, not just by the proponents of it, but by outside experts. As I think the Court is aware, a leading health care antitrust lawyer, James Burns of the Akerman LLP law firm, published in *Lexology* an analysis of the settlement. And he noted that while the money that will be paid out of the proposed settlement, if approved, is substantial -- and this is key -- quote, the injunctive relief terms are even more significant, as they have the potential to reshape the state of competition in health insurance markets going forward.

And he goes on to say, quote, if approved, the changes to the Blue Cross rules potentially could spur additional competition in health insurance markets all across the country and notes that, specifically, the elimination of the restriction on a Blue licensee's non-Blue business should permit out-of-state Blues to compete more often with a home Blue for new business, particularly for businesses from larger employers with dispersed employees.

There was also -- the Washington insurance commissioner, Mike Kreidler, said, quote, This settlement should increase competition, which is great news.

The American Antitrust Institute recognized this settlement's achievement by awarding it both the Outstanding Antitrust Litigation Achievement in Private Law Practice award

as well as the Outstanding Antitrust Litigation Achievement in Economics award as a result of their analysis of what this litigation has accomplished. And I think the recognition of this settlement's achievement by prestigious independent organizations like the American Antitrust Institute is something that is properly taken into account in assessing this settlement and its overall fairness.

The *Global Competition Review*, you know, a leading publication, international publication, concerning competition policy and antitrust issues, also awarded us the team award for the litigation of the year, cartel prosecution. And, again, I think this is part of the context that is -- it's worth keeping in mind as we go through the various aspects of this settlement over the course of the next two days.

Now, of course, it's not just the outside analysts' views who are important. It's also important to look at what class members have done. To date, there have been more than 7.1 million claims filed. As the Court is aware, we still have two weeks to go in the claims-filing period, and I'm sure there will be additional claims filed. But as of today, there are more than 7.1 million claims that have been filed. That represents over 215,000 businesses and group health plans, over 1.5 million individual policyholders, and over 4.8 million employees.

The number of claims filed here is massive not only in its own terms, but also in comparison to the kind of response

that you ordinarily get in class-action settlements.

THE COURT: I remember asking the parties what would be an acceptable claims rate.

MR. BOIES: Right.

THE COURT: And I think I might have had a discussion or two with the special master. And the goal was to get above 2 percent based upon national --

MR. BOIES: Right.

THE COURT: -- tracking and averages. I want to say 2 percent of the people reached out to me and asked me if this was for real.

MR. BOIES: But that's exactly right, Your Honor, that we had -- we had hoped to get 2 percent. We were very happy when we passed the one million claims mark. And I think to get here shows the overwhelmingly positive reaction.

And as the Court is aware, the percentage of claims in a class action like this, you know, tends to be very small. And I think that in comparison to what you would ordinarily expect, I think the claims that have been submitted here are a good illustration that people generally recognize the significance of this.

And this, of course, relates to the money, which, as I say, is important. It's certainly one of the very largest antitrust recoveries in history. I think it is -- I think it is the largest antitrust recovery in a case where there was not a

government investigation. So it is -- the monetary relief is important. But I keep coming back to the fact that as the Court has said itself, the injunctive relief is really what is a game changer for the health insurance market.

Only 2,049 class members have opted out.

THE COURT: How does that compare to your expectations going in?

MR. BOIES: Well, it's a very small fraction, I think, of what we and the defendants projected based on --

THE COURT: No concern about a blow provision here.

MR. BOIES: There's no -- not even close. Not even in the ballpark. And that relates to only 307 businesses and group health plans and 1,742 individuals.

THE COURT: Let me take you back to your point about the financial recovery and the financial relief. Did I hear you say this is the largest financial recovery in a private antitrust case that you're aware of?

MR. BOIES: Where there was not a government investigation.

THE COURT: That's what I'm saying. A private -- private action.

MR. BOIES: Yeah. Well, there --

THE COURT: And there could be some private actions which originated from a government -- that's the distinction you're making is --

MR. BOIES: Yes.

THE COURT: -- if FTC or DOJ had done the investigation and a plaintiff had picked up on that and filed an action with the benefit of that investigation.

MR. BOIES: Right. It's easy when you come in behind the FTC or the Department of Justice. It's not so easy when you're starting from scratch. But even with respect to antitrust class actions, even those that follow a government investigation, this is certainly one of the top two or three or four of those. So even in the broader context, this is one of the very largest antitrust class-action recoveries in history. And as I say, I believe it's the largest for a case in which there was never any antitrust investigation.

We have 123 objectors with a total of 40 objections. Two- --

THE COURT: Have there been any formal or informal communications that your group has had, your -- that class counsel has had with any of the governmental investigative bodies, FTC or otherwise, about the settlement?

MR. BOIES: Not other than what we've talked about before in terms of Department of Labor, Your Honor.

THE COURT: Right. Okay. And, obviously, the Washington State --

MR. BOIES: Yes.

THE COURT: -- situation you brought to my attention.

MR. BOIES: Right. But not the Department of Justice or the Federal Trade Commission.

Two-thirds of the objectors are represented by the same law firm. And while we certainly respect the right of people to object -- and as I say, we've certainly taken some of those objections into account in our views with respect to the placement of the additional-Blue-bid provision in a (b)(3) class -- we think that if you look at the entire settlement as a whole and you look at what has been accomplished for each of the members of the class, both fully insured and self-funded, and you compare this to the fact that prior to the time that we brought this litigation, no one was complaining about this, no one was bringing lawsuits, no one was seeking to recover overcharges, no one was seeking to eliminate these restraints, I think that you can fairly conclude that this is an enormously positive settlement. It provides a very large amount of money and, more important, it provides injunctive relief that has the capacity to change the state of competition in the important health insurance market. And as I've said, that's not just our view. That's the view of respected, independent outside experts.

Unless the Court has additional questions about what I have covered, Mr. Cooper will now address his overview of what the final approval standards are. And then we will go on to try to demonstrate that we, in my view, easily meet those standards.

THE COURT: Is this a good time to take a short break for everyone?

MR. BOIES: It is, Your Honor.

THE COURT: Realizing we have this many people here, someone needs a break.

All right. We'll break for about ten minutes.

MR. BOIES: Thank you.

(Recess at 11:14 a.m. until 11:30 a.m.)

THE COURT: All right. Let's come to order.

All right. Mr. Cooper.

MR. COOPER: Good morning again, Judge Proctor. And may it please the Court.

THE COURT: Good morning.

MR. COOPER: As Mr. Boies mentioned, I am going to go through an overview of final approval standards. And in doing so, I'm mindful that there's no one in this courtroom who is more closely familiar with those approval standards, Your Honor, you having presided over a number of settlements, including some sense of 2018 amendments. I'm also mindful that we've put 140 pages of briefing and voluminous exhibits before you, and I'm sure you've been through those as well.

But in the spirit of starting from scratch, as you put it, I am going to go through these standards and principles, but I think we can move through them pretty quickly.

Underlying all of the standards, Your Honor, as the

Eleventh Circuit recently reiterated in the *Equifax* case, is this principle that settlements -- and I'm quoting from *Equifax* -- are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits.

And this is a principle, Your Honor, that many courts have acknowledged and have emphasized is particularly strong in the context of class actions.

I'm going to now address the legal standards under Rule 23(e)(2). And those are well known, certainly, to you, but everyone in the courtroom. And the Court should find and grant a final approval of a class action if it finds the settlement simply to be fair, reasonable, and adequate. And that is a discretion standard, Your Honor. The Court has broad discretion; and that discretion, many courts have emphasized, should be exercised in light of the general policy favoring settlement.

And beyond that, Your Honor, there's a strong presumption of fairness that attaches to a settlement agreement when it is the result of arm's-length negotiations. And I'll return to that point.

Next slide here. Under Rule 23(e)(2), Your Honor, to determine if a settlement is fair, reasonable, and adequate, the rule requires that the Court consider four core factors, as follows: the class representatives and class counsel have

adequately represented the class. Of course, here, Your Honor, we have 67 class representatives and scores, Your Honor, of highly experienced and, I might add, talented class counsel on our side of the case.

THE COURT: Not to mention the other side.

MR. COOPER: I certainly concede that. Absolutely, Your Honor.

And the proposal was, secondly, negotiated at arm's length. Third, the relief provided for the class is adequate, taking into account four factors, which the Court is familiar with and I won't trudge through. And finally, that the proposal treats class members equitably relative to each other.

The 2018 Advisory Committee notes make clear that these four core concerns are intended to supplement and not to displace any factors or considerations that individual circuits have developed over the years. And, Your Honor, the Eleventh Circuit has developed what are well known to all the courts and practitioners in this circuit as the six *Bennett* factors, named after the *Bennett* case from 1984, to determine whether a settlement is fair, reasonable, and adequate. And the courts have consistently applied both the 23(e) core considerations and the *Bennett* factors. And they do have some overlap.

But those six *Bennett* factors, Your Honor, again, have recently been reiterated by the Eleventh Circuit in the *Equifax* case, and I've listed them here in the slide that's before

you. One is the likelihood of success at trial; two and three are always considered essentially in tandem, the range of possible recovery and the point on or below the range of recovery at which a settlement is fair, adequate, and reasonable; four, the complexity, expense, and duration of litigation; five, the substance and amount of opposition to the settlement; and six, the stage of proceedings at which the settlement was achieved.

Your Honor will well recall that we made a detailed presentation concerning both the four 23(e) factors and the six *Bennett* factors at the preliminary approval hearing. Since then, objectors have made some very specific objections to portions of the settlement. And we'll be addressing those later today. But the Court's preliminary approval order recognized preliminarily the Court's view that the settlement was fair, reasonable, and adequate. And it emphasized some of the following reasons.

First, the class was adequately represented. The Court pointed out that class counsel have litigated scores of antitrust cases to resolution and are recognized as top authorities in the field. And the Court, of course, had, by then, eight years of experience with all the lawyers in this courtroom and was, therefore, well acquainted with the performance of class counsel. And so the Court concluded that all class representatives and all class counsel have more than

adequately represented the settlement class.

Your Honor, I would like to just say that -- and I think I can say this on behalf of all of the scores of lawyers who have worked on this case and been before you -- that it has been a privilege to work alongside and under the leadership of Mr. Boies and Mr. Hausfeld. And I want to also offer a collective hat-tip on behalf of settlement-class counsel to our friends representing the Blues; in particular, Mr. Zott, Mr. Laytin, and the lawyers working under their leadership throughout this. They have dealt with us in completely good faith and almost always with good cheer.

I should point out here that there is an objection to the adequacy of representation with respect to the self-funded class, and you'll be hearing more about that later.

Your Honor, secondly, the settlement was clearly negotiated at arm's length. This was not a quick resolution. And there's no suggestion of collusion, as this Court noted in the preliminary approval order.

And, Your Honor, the parties have held dozens -- I would say scores -- of unilateral, bilateral, and multi-lateral conferences over a four-year period of time, meeting in person, virtually, and pretty much constantly over these four years.

And, Your Honor, the only thing I would say that was probably lacking from our marathon negotiations is that we never met at Camp David and Henry Kissinger never did get involved.

But we had our own Henry Kissinger, Your Honor, Special Master Ed Gentle, who was preceded, at least for a short time, by Judge Phillips. And as the Court quite correctly recognized in your preliminary approval order, Mr. Gentle was extremely helpful in helping the parties to ultimately, now, attempt here before you to lay down their swords and make peace.

As the Court pointed out, Mr. Gentle has submitted a declaration attesting to the fact that there was no collusion involved; therefore, it is clear that the settlement was negotiated at arm's length. And the Court has no reason to suspect collusion. And, Your Honor, I would just add that far from collusive, this negotiation over four years was adversarial in every possible respect. In fact, if we had been colluding, we wouldn't have taken anywhere close to four years to come to the agreements that we have come to.

THE COURT: The only thing I'd note is that knowing Ed as I do, he might align himself more with Dean Acheson. I could be wrong.

MR. COOPER: Well, I think he performed as well as either Mr. Acheson or Mr. Kissinger. We're all deeply indebted to him for his constant perseverance and his efforts.

Now, Mr. Boies has covered at some length the fact that the settlement -- if ultimately it wins your approval, Your Honor, and the objections are resolved, it has and it will avert years of complex, expensive, and risky litigation for the class.

I won't elaborate on that other than to say that this Court, in the *Swaney* decision, pointed out that when the outcome on class certification and the ultimate outcome on the merits is uncertain, a settlement is appropriate.

And, Your Honor, the factual record that was developed over eight years of what -- I think this Court called it trench warfare litigation was voluminous, to say the least. Mr. Boies described it, but the bottom line is, as this Court put it in its preliminary approval order, it is clear that the factual record in this matter was sufficiently developed to allow class counsel to make a reasoned judgment as to the merits of the settlement.

And, Your Honor, the settlement provides enormous benefits to the class that we have represented. And they are reasonable when compared to any potential likely recovery. The Court itself recognized, again, in the preliminary approval order, that at 2.67 billion, the settlement does represent one of the largest antitrust class settlements in history. And as Mr. Boies has emphasized previously and here today, we believe that the structural relief that the plaintiffs have obtained is more important than the dollar amount of the settlement. This Court agreed with that in the preliminary approval order and said as follows: The injunctive aspects of the settlement significantly alter the Blues' business practices and substantially increase the value of the settlement to the class

members.

And the Court noted that the recovery of 2.67 billion does fall well within the range that a host of precedents have suggested is appropriate when measured against the potential recovery.

Your Honor, now I'm going to move to the question of the standards governing certification of the settlement class. And the essential standard for certifying a class is that the determination whether to certify a class for settlement purposes is left to the sound discretion of the court, much like Your Honor approving a settlement as fair, reasonable, and adequate.

And here, Your Honor, as you discussed with Mr. Boies in his introduction, we seek to certify three settlement classes: a nationwide 23(b)(2) injunctive relief class, a nationwide 23(b)(3) damages class, and a self-funded 23(b) subclass.

And, Your Honor, I want to come back to the issue that you raised in your opening remarks and that you and Mr. Boies discussed earlier about the question of whether this is -- the second Blue bid, which is afforded to qualified national accounts, is (b)(2) relief or is more appropriately viewed as (b)(3) relief. And as Mr. Boies mentioned, we have come around to the view, which is a shift from the papers that we filed before the Court in our preliminary approval round, that this relief better fits the (b)(3) rubric in light of *Wal-Mart* and

Wal-Mart's teaching that (b)(2) relief is for indivisible injunctive relief that benefits all members of the class at once.

And, Your Honor, again, after careful thought once this concern surfaced and a lot of research and debate, frankly, among ourselves and with our friends representing the Blues, we have come to the view that it much better fits (b)(3) because it appears much more like individualized injunctive relief than the kind of indivisible injunctive relief that *Wal-Mart* says is reserved for (b)(2).

But, Your Honor, to the extent there is uncertainty on this for the subscribers' class counsel, we believe that uncertainty should be resolved and the default should be (b)(3) class. Certainly that's more protective of the class that we represent because it does carry with it the procedural protections of notice and opt-out. And we have come to the view that as (b)(3) relief, we should provide supplemental notice.

THE COURT: If we were in the law school classroom, we might have a roundabout on (b)(2) discretionary opt-out versus (b)(3) opt-out as a matter of right. I think in this context, the (b)(3) opt-out as a matter of right is just clearer. I don't know that I have to -- I don't know that this is a discretionary matter for the Court. I think it's just a matter of protecting class members who may wish to opt out. And that's kind of where I've landed on this, subject to hearing

everyone out over the next two days.

MR. COOPER: Sure, Your Honor. And through this process of, you know, careful analysis and debate, we too have landed -- we too have landed there, and we're advocating to you that this be viewed as (b)(3).

And I guess kind of the overarching point I would make -- and this perhaps, maybe, is more fitting for the classroom; but I would just say that it surely cannot be that Rule 23's class certification buckets, (b)(2) and (b)(3), are so procrustean that a type of valuable, meaningful, procompetitive injunctive relief is impermissible if it does not fit neatly, like a glove, in one bucket or the other, Your Honor. And it cannot be that the same settlement agreement -- if we had come to the Court seeking approval for a settlement agreement that didn't include the second-Blue-bid relief, which Mr. Boies has quite correctly and I think appropriately emphasized as key relief that we believe is very, very important to this settlement, but if we --

THE COURT: One question -- I'm sorry. I didn't mean to interrupt you. Go ahead. Finish that thought and I've got a question.

MR. COOPER: Well, I was just going to say that if we had come without the second Blue bid, we would also have thought it's fair, reasonable, and adequate. And surely it can't be that successfully negotiating that additional Blue-on-Blue, for

the first time, procompetitive feature, that that feature is impermissible or it would make the settlement agreement, as a whole, not approvable. That doesn't make any sense.

And so, Your Honor, we would just say, in the spirit of the classroom, I guess, as well as this courtroom, that this release -- relief clearly has to fit in one or the other, and we think it much better fits in the category of individualized injunctive relief.

THE COURT: And perhaps I'm overstating this. I don't think I am. But this is a fairly cutting-edge issue. There's not a lot of litigation out there that lands with injunctive relief ending up in a (b)(3) category. Again, I -- my preliminary leaning right now is that's the appropriate way to handle this.

Is there any other divisible injunctive relief other than monetary relief -- obviously, divisible monetary relief squarely fits in (b)(3) and has since *Wal-Mart versus Dukes*. But -- and by the way, that finding, that conclusion by the Court, was 9-0 on the (b)(3) issue. It was the 23(a) issue that divided the Court on commonality.

MR. COOPER: That's right.

THE COURT: But I wonder, though, if there's any -- if the scope of the opt-out right should be to pursue divisible relief that would not be inconsistent with the (b)(2) injunctive relief granted by the Court. And that's perhaps a broader

category than the parties have discussed; maybe it's not. But that means that we are protecting adequately, it seems to me, the opt-out right to pursue whatever relief someone who opts out would be able to pursue consistent with the (b)(2) injunctive relief that they're bound by.

MR. COOPER: Right, Your Honor. And consistent with any type of individualized injunctive relief that an opt-out believed that it, standing in its own shoes, not only a class or anyone else, but standing in its own shoes, should be entitled to as an opt-out as it decides -- but also, Your Honor, bound by the indivisible (b)(2) relief.

And, you know, Your Honor, you asked about -- you mentioned the possibility of judicial discretion in a (b)(2) context to actually order relief. Certainly before *Wal-Mart*, there were a number of cases where that was done. Since *Wal-Mart*, there have been a couple of cases -- at least our research has only turned up a couple of cases, because we thought about exactly this possible approach. But we haven't been able to find a case where that's actually been done as opposed to dicta suggesting that that kind of discretion did survive *Wal-Mart*. There are some cases that say it did not, Your Honor. But it is an interesting -- very interesting classroom discussion.

But for our purposes, both as representing the class and, we think, for the safety of our --

THE COURT: This (b)(3) solution takes the academia out of it.

MR. COOPER: It does. It does, Your Honor.

And, Your Honor, on this slide, slide number 32, we simply identify the existing class definitions in the settlement agreement, with which the Court is familiar.

And, Your Honor, the requirements for certifying a class, a settlement class, the courts must find under, you know, hornbook law, one, that the named plaintiff has standing; two, that all four prerequisites for class certification under 23(a) are satisfied -- those are numerosity, commonality, typicality, and adequacy of representation -- and finally, that at least one of the requirements of 23(b), Your Honor, is met.

And in this case, of course, Your Honor, standing needn't detain us. It's clear that the class representatives have standing in the class, and no one has suggested otherwise.

Your Honor, with respect to the 23(a) requirements, the Court found in its preliminary approval order in which it granted preliminary approval that all the requirements of 23(a) were satisfied, numerosity, commonality, typicality, and adequacy. And those are not controversial here today at all.

Your Honor, just to articulate here for the record what certification under 23(b)(2) does require, it's proper if the party opposing the class has acted or refused to act on grounds that apply generally to the class so that final injunctive

relief or corresponding declaratory relief is appropriate respecting the class as a whole. It is this requirement that the court obviously was keying off of in the *Wal-Mart* case to say this is for indivisible injunctive relief.

Certification under a (b)(3), Your Honor, is proper if the court finds that questions of law or fact common to the class members predominate over any questions affecting only individual members and that a class action is superior to other methods for fairly and efficiently adjudicating the controversy.

And as Justice Scalia recognized in *Wal-Mart*, this is the more protective category of class action, and it is essentially -- I think "catchall" is not the right phrase, but the place where any uncertainties should be resolved. And it's a default category.

Your Honor, we submit, as we did in the preliminary approval hearing, that certification of the proposed (b)(2) injunctive relief class is clearly justified and appropriate. The Court, in its preliminary approval order, said that the proposed settlement provides significant relief to all members of the injunctive relief class. And specifically, the Court found that in the final analysis, it will likely conclude the proposed injunctive relief will prevent injuries similar to those at issue in this case from occurring, greatly increase competition among the Blues, and substantially benefit all members of the classes. Therefore, the requirements for

certification of a class under Rule 23(b)(2) are satisfied.

Your Honor, we also submit that the requirements for certification of the proposed (b)(3) class and the subclass is likely -- is likewise justified. Both the requirement of predominance is clearly satisfied and, as the Court noted, class action is plainly superior, given the fact -- in this case, given the fact there are tens of millions of settlement class members. And so a class action is the only feasible method of resolving all the claims against the settling defendants.

So with that, Your Honor, I've concluded a survey of the standards that govern the Court's consideration and will call upon my colleague, Mr. Hausfeld, to take it from here.

THE COURT: Thank you.

MR. HAUSFELD: I believe I still have a few more moments, Your Honor, to say good morning.

And in the interests of brevity and efficiency and in light of the comments that have been already made to the Court and with Your Honor's assent, I will preliminarily introduce the overall response to the essentially ASO objectors. Mr. Burns, of course, you know, he's here, fully prepared to answer any additional questions or submit any additional comments, if that is agreeable to Your Honor.

THE COURT: That's fine. I'll be glad to hear from both of you at the appropriate time.

MR. HAUSFELD: Thank you, Your Honor.

If we could look at slide 40.

Again, following on what Mr. Boies said in his introduction, there have been 40 objections submitted by 123 objectors, but that's out of over 100 million potential class members that received notice. We put the percentage of objections to total noticed class members, and it's virtually one in a million.

As Mr. Cooper has said, looking at slide 41, the standard for approval --

THE COURT: Wouldn't that be closer to one in a hundred- -- no, you're, I guess, right. I guess that's right. A little over one in a million.

MR. HAUSFELD: It took me a while to make sure of that.

THE COURT: Yes. I had to do the math too. But I got confused looking at the decimal rather than just looking at the two numbers.

MR. HAUSFELD: Yes. Thank you, Your Honor.

The standard for approval, as Mr. Cooper explained, under Rule 23(e)(2) is whether the agreement, the settlement as a whole, overall is reasonable and adequate.

And what you have here, despite the fact that there are many objections, there are three essential categories of objections: one, you should not approve the agreement without first determining to a legal certainty the legality of the going-forward system; two, that many of the ASO -- or a certain

number of the ASO objectors merely want more additional bids without any eligibility criteria; and three, there is at least one set of objectors who just want a larger share of the settlement fund without making any comment or accepting the fairness and adequacy of the settlement fund as a whole.

I could not have summed up the law with regard to these types of objections, in consideration of the Court's obligation to review the fairness and adequacy and reasonableness of the settlement as a whole, other than to quote from the *Henderson* case that the settlement is the offspring of compromise. The question that the Court needs to address is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion.

Many of the objectors, as I said, just simply ask for something more. But the essence of the objectors is to seek to jeopardize what has been achieved for the settlement classes by asking that the certainty that this historic settlement provides and as Mr. Boies said, initiates far earlier than otherwise could have occurred if this were to play out in endless forms of litigation -- to scuttle the certainty of the settlement for years of extremely costly and complex litigation in multiple forums.

And now, Your Honor, again, with the Court's permission, I'd like to bring back Mr. Cooper to discuss the objections regarding the going-forward system.

THE COURT: All right. Thank you.

MR. HAUSFELD: Thank you.

THE COURT: Of course, Mr. Cooper, this is one of the areas I flagged.

MR. COOPER: It is indeed, Your Honor.

THE COURT: So I'll let you get started before I pounce upon you like a wildcat.

MR. COOPER: Okay. Well, let me get going, at least.

As Mr. Hausfeld mentioned, I'm going to speak to objections regarding post-settlement conduct. And I plan to address three objections that have been lodged against the settlement agreement. The -- and they come from the Sperling-Sherrard opt-out objectors and Home Depot. They object that the settlement should not be approved because doing so would, one, perpetuate a per se violation of Section 1 of the Sherman Act, specifically by leaving the ESAs in place, Your Honor --

THE COURT: And you would agree that if there was either a per se violation that would be attributable to the continued operations of the Blues and any restrictions on competition, I could not approve that?

MR. COOPER: I do agree with that, Your Honor. And --

THE COURT: Would you also agree that if I determine the rule of reason applies to this new set of circumstances, that I have to make a determination that the procompetitive

benefits outweigh the anticompetitive effects to approve it --

MR. COOPER: Your Honor, I don't --

THE COURT: -- or is it just clearly a legal standard?

MR. COOPER: Our survey of the cases, Your Honor, satisfies us completely that you need only conclude that neither the going-forward Blue system in the aggregate, which you examined in your standard of review order, nor any feature of that system going forward is clearly illegal. And I'm going to come to the cases that we believe satisfy us, anyway, and we would suggest should satisfy you that that's your responsibility.

But you are absolutely right. You cannot -- you cannot approve the settlement if you conclude that there's a clear -- something clearly illegal, if there's a per se violation that remains after these reforms that we've achieved.

And, Your Honor, I think it appropriate for me to say that if we did not believe -- we, class counsel, did not believe that there is no per se violation in this settlement agreement that will be perpetuated either in the aggregate or looking at any of its features -- if we did not believe that, if we thought there was, we could not conscientiously have agreed to it and we could not place it before you conscientiously for approval, Your Honor.

THE COURT: And would not.

MR. COOPER: And would not.

The second objection that I will address is that the settlement, it is claimed, requires the Court to improperly issue an unconstitutional advisory ruling that conduct by the defendants under the post-settlement system is not per se unlawful.

And finally, Your Honor, third, they say that the settlement impermissibly limits a private party's right to enforce the antitrust laws and will result in the release of future antitrust claims for injunctive and equitable relief in violation of public policy. I'll answer each -- I'll address each of these in turn, Your Honor.

But first, as you've noted, the standard for approving a settlement clearly includes a determination by the Court that the settlement agreement does not authorize clearly illegal conduct. The classic formulation, Your Honor, is that a district court abuses its discretion in approving a settlement only if the agreement sanctions clearly illegal conduct.

And, Your Honor, I think -- I think that this is simply to say that a settlement agreement that does sanction patently illegal conduct could hardly ever be found by this or any court to be fair, reasonable, and adequate. So it seems to just be inherent in the standard that governs this Court's discretion in the first place.

And I'd now like to jump, if I may, Hamish, to slide number 50 because I think the --

I want to identify the legal standards, Your Honor, here all together. Yes.

THE COURT: Well, let me ask you this.

MR. COOPER: Yes, sir.

THE COURT: I'm focusing in -- if you could flip back one page.

I'm focusing in on the second bullet point about the advisory ruling. In this area where any antitrust settlement that involves this type of across-the-board conduct and these type of alleged restraints, isn't any settlement in this area necessarily going to require the Court to pass, or not pass, approval of the settlement by stating an opinion about the legality of the structural relief?

MR. COOPER: Yes, Your Honor.

THE COURT: I don't know that that's advisory. I think that's just -- that's a case or controversy that's before the Court, should I approve the settlement or not. That sits in equipoise, it seems to me. And at this point, it's certainly a dispute in the case because the objectors say I should not and proponents of the settlement say I should.

So I don't think advisory opinion is the correct language. There may be arguments that the Court doesn't have enough information or experience at this point to approve it. We can address those things. But I don't think stating that this is an advisory ruling makes sense.

MR. COOPER: No, Your Honor.

THE COURT: What's your take on that?

MR. COOPER: Absolutely, Your Honor. And I'll just fast-forward to this point, and that is that it appears that the objectors think that because the formerly contesting parties who are here basically in an effort to lay down their swords, as I said earlier, are united in their view that, for example, this settlement that they're presenting -- that we are presenting to you is not clearly illegal, it does not perpetuate any per se violation of the Sherman Act, that that has eliminated the adversarial context in which the case has to be litigated for Article III purposes, Your Honor. But it -- first, it doesn't make sense, as I think the Court was saying, to say that the Court must find, as a host of cases say, that nothing in the settlement agreement that would resolve this class action perpetuates clearly illegal conduct or sanctions it. Obviously, if that's a requirement, the Court has to find it. It must have Article III jurisdiction to render that judgment.

And, Your Honor, this issue was essentially -- or at least this proposition, I think, was dealt a fatal blow in *Equifax* where the court said as follows. And I've set this out on slide number 51: We hold that Article III's case-or-controversy requirement is satisfied throughout the settlement process because the litigation remains in an adversarial posture during that process. Indeed, the parties

remain adversaries all throughout the settlement approval process because until approval, the settlement is not final; and if the district court rejects the settlement, the parties would continue their litigation.

THE COURT: Far be it for me to tweak the Eleventh Circuit --

MR. COOPER: Right, Your Honor.

THE COURT: -- but it seems to me that the better position there is not that you remain potential competitors, if I could mix my metaphors, with the Blues because if the settlement is not approved, you would pick the swords back up and commence to hammering --

MR. COOPER: Yes, sir. Yes, sir.

THE COURT: -- but the case or controversy is met here particularly when objectors come in and litigate before the Court an objection like this.

Rule 23 acknowledges, though, I think, the Court's authority to pass on the -- applying the correct standards -- the propriety of the settlement without a case or controversy in terms of the settlement, if I could again mix my metaphors.

I've actually had class action settlements where there were no objections. I didn't for a moment think that this was going to be one of those, but I've had that. And I still think I had the authority -- and maybe it's, in part, because of what the Eleventh Circuit said in *Equifax*, but I also think it's

because Rule 23 invests in the Court -- congressionally approved Rule 23 invests in the Court, with amended standards as recently as 2018, the responsibility to assess and make sure that a settlement is fair, adequate, and reasonable.

MR. COOPER: That's exactly right, Your Honor. And as I mentioned earlier, inherent in the notion of fairness and reasonableness surely must be that it doesn't give the defendants some kind of a green light or a license to engage in patently anticompetitive per se behavior.

So, Your Honor, we just would --

THE COURT: Now, it does help the Court when we have high-quality counsel, like we have in this case, objecting. It does bring issues into focus that may have otherwise escaped the Court's attention. So before they even get up, I'm going to tell my objectors that I appreciate their presence in this case and appreciate the opportunity that affords the Court to really assess this settlement carefully, particularly in such a big case and an important matter.

MR. COOPER: Well, I'm not sure I'm going to join the Court with that.

THE COURT: I'm singing solo there.

MR. COOPER: But, Your Honor, I am going to come back to your point that the objectors themselves, to the extent there would be any merit to the idea that we're no longer adversaries and you're --

THE COURT: Well, you know, there are five types of objectors, at least: philosophical objectors; objectors that are self-interested; governmental objectors; disgruntled, dumped-at-the-altar, didn't-get-my-class-certified objectors or got-excluded-from-the-team objectors; and then positional objectors, the ones who bring issues before the Court that require some attention.

MR. COOPER: Yes.

THE COURT: So maybe I cast my net too wide when I talk about objectors generally, but I'm talking about these objectors.

MR. COOPER: Absolutely, Your Honor. But these objectors have been -- and they are certainly experienced, skilled, highly credentialed and qualified lawyers, make no mistake. But, Your Honor --

THE COURT: Despite all that, you disagree with everything they said.

MR. COOPER: Every last word, Your Honor. But I think you've made an excellent point -- and the *Equifax* court came very close to making it as well -- that to the extent that we would lose our -- the adversary -- the adversity necessary to Article III jurisdiction here, the objectors themselves supply it. So...

THE COURT: It would be kind of a strange turn of events in the law and be counterintuitive if only settlements

that were so solid that there were no objections the Court did not have jurisdiction -- subject-matter jurisdiction to rule on them because there was no case or controversy before the Court. That would be kind of an odd twist in jurisprudence.

MR. COOPER: Yes. Yes, it would, Your Honor. It's -- we just believe there's no merit to the point, and we'll leave it there.

But coming back to slide 50, then, to further outline the -- and I guess put a little bit more meat on the bone of the clearly illegal standard, it's clear that while the Court must find that there's nothing clearly illegal in the settlement agreement, it's not required to resolve the ultimate merits of the legal claims. The --

THE COURT: And, hence, not required to apply the rule of reason because this would only be done after protracted litigation.

MR. COOPER: Your Honor, just to put it in terms I think that we in this courtroom understand, if your standard of review order concluding that in the aggregate, the Blues' system was a per se violation had been reviewed in the Eleventh Circuit, they had disagreed with you -- let's say that they agreed that *Sealy* and *Topco* have been undermined and they're not going to follow them -- and we had come back to try a rule-of-reason case, Your Honor, we would be in this courtroom for weeks and weeks and weeks. And that's under --

THE COURT: And may settle then.

MR. COOPER: Well, very -- possibly. But that would be under the Blues' system --

THE COURT: Maybe you wouldn't have got a favorable return. But --

MR. COOPER: Your Honor --

THE COURT: -- that's the point; right?

I guess that's my question, though, is it seems to me that even if we were litigating this case under the rule of reason, the case law suggests that -- to make sure there's compliance with Rule 23, fair, adequate, and reasonable, and the *Bennett* factors in the Eleventh Circuit. The point of a settlement means that the parties have told the court, we don't want to go forward and litigate to the finish anymore. We would prefer to settle our case. We've had enough time to evaluate our positions. We have enough information to evaluate our positions. We think we've had an arm's-length negotiation.

And in this case, I told the parties early on one of my requirements if they wanted to go negotiate -- and this was years ago -- was there had to be a third-party mediator involved to make sure that things were on point.

MR. COOPER: Yes.

THE COURT: I don't think that's necessary -- it probably wasn't necessary in this case in light of the quality of counsel, but I just think that's an added protection, check

and benefit, on behalf of the absent class members to make sure that there is a neutral supervising the negotiations.

MR. COOPER: Absolutely, Your Honor. And the advisory committee notes since the 2018 amendments make exactly that point. So the Court was completely consistent with the --

THE COURT: But the point is that we are saying we're not going to continue litigating even a rule-of-reason case. We want to settle it, and we think we have enough information to do so.

MR. COOPER: That's right, Your Honor. The parties have now, after eight years of the trench warfare, Your Honor, that you described -- we can now fully appreciate and I think assess the strengths and weaknesses of our case, the litigation risks that we run, both in this court and in the other courts where we would ultimately end up. So you're absolutely right.

And, again, to I guess further -- just to quickly elaborate the clearly illegal point, the Fifth Circuit has said in its *Corrugated Container* case that the very uncertainty of outcome in litigation as well as the avoidance of wasteful litigation expense, the Court's comment just now, lay behind the congressional infusion of a power to compromise. This is a recognition of the policy of law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty.

The next --

THE COURT: And even *Bennett* makes that point; correct?

MR. COOPER: I beg your pardon?

THE COURT: Even *Bennett* makes that same point.

MR. COOPER: Yes. Yes. In fact, *Bennett* is my last quote here. I'll jump to it right now. Unless the illegality of an arrangement under consideration is a legal certainty, the court said -- unless the illegality, if I didn't articulate that, of an arrangement under consideration is a legal certainty, the mere fact that certain of its features may be perpetuated is no bar to approval.

So to return now to our slide number 44 -- actually, to 45 -- I've identified two cases on this slide, Your Honor, one from the Second Circuit, which is a well-known case called *Robertson against The National Basketball Association*.

THE COURT: Is that Oscar?

MR. COOPER: That's Oscar Robertson. Sure is. Yes, sir.

THE COURT: What a legend.

MR. COOPER: Absolutely. Well, Your Honor, just some stories about Oscar Robertson just started flooding into my mind.

THE COURT: We'll tell those later.

MR. COOPER: Your Honor, that case approved the settlement over the objection that it perpetuated the very kinds

of conduct that were challenged in the case, classic group boycotts. And it approved the settlement because the court found that the settlement authorizes no future conduct that is clearly illegal.

And, Your Honor, the most important point that the *Robertson* court made, the Second Circuit made there, was that there's no case that's been decided that has held that this alleged group boycott was unlawful. Of course, there's no case that the Court can look to that would enlighten the Court one way or another with respect to the Blues' system, either before the settlement and certainly not after.

This *Grunin* case is of a similar nature, Your Honor. It comes from the Eighth Circuit. It too is often cited. And that court approved a settlement over an objection that it perpetuated a per se unlawful tying arrangement, the tying arrangement that was challenged in the case, because the court could not say -- I'm quoting now -- as a matter of law that the settlement agreement included any such per se violations.

So, Your Honor, we would submit to you also that the objectors' arguments along these lines rest on what we believe are misunderstandings, mischaracterizations of the Court's summary judgment opinion on the standard of review concerning the ESAs. In fact, you know, to tell you the truth, Your Honor, their briefing to the Court reads, to me, like a petition for reconsideration of your standard of review order.

First, Your Honor, the Court did not analyze ESAs standing alone in their own shoes. The Court concluded only -- and I'm quoting now from the opinion -- that defendants' aggregation of a market allocation scheme together with certain other output restrictions is due to be analyzed under the per se standard of review.

And in fact, the Court went on and said specifically that it need not decide whether the Blue plans' service area allocations alone constitute a per se violation of Section 1. So the Court really just could not possibly have been any clearer.

The other thing, Your Honor, I need to point out is that the objectors are simply wrong when they say that the Court rejected -- effectively rejected the defendants' single-entity defense. The Court clearly didn't, nor did the Court find the facts that would make rejection of the single-entity defense follow *a fortiori*, as is suggested by the objectors.

THE COURT: I think I said that's an issue for the trier of fact to determine, that I didn't have a Rule 56 record that permitted me to make a ruling on that one way or the other.

MR. COOPER: Exactly, Your Honor. You kicked that to the jury. We were going to have to try that up.

Now, Your Honor, I can't help but reiterate, really, here what Mr. Boies has said in his opening remarks, and that is to simply note that the ESAs that the objectors now say are

patently illegal never bothered them until now. They were content, Your Honor, in the face of this patently illegal antitrust violation, to suffer in silence under the Blues' predations, some of them for decades, even though their existence was a matter of public record, as Mr. Boies pointed out, for, again, decades.

Now, they weren't alone in that, as Mr. Boies pointed out. The market allocation areas were noted by a number of courts; never suggested that there was a problem. They were well known to the federal antitrust agencies for decades and especially after we brought this litigation, and they've never been challenged until this litigation that's before you.

Your Honor, just to -- now, coming into the home stretch here, we would submit that given the sweeping, procompetitive reforms that would result under the settlement agreement if the Court grants its approval, we believe that the Blues' system in the aggregate and the ESAs --

THE COURT: Let me just back you up on one point.

MR. COOPER: Sure.

THE COURT: When you say that several courts have recognized the existence of the ESA restrictions, none have ever determined that they're unlawful, are you talking about in the context of Blue Cross Blue Shield ESAs?

MR. COOPER: Yes.

THE COURT: I think Judge Bucklo in the Northern

District of Illinois this year issued an opinion on Delta Dental that I think I was on the panel when we sent that case to her, an MDL.

MR. COOPER: Okay.

THE COURT: And she concluded that the ESAs in that case were a per se violation.

MR. COOPER: I stand corrected. My research I guess is not one --

THE COURT: You have the lunch hour to get up to speed on that.

MR. COOPER: Yes. Well, my associates will hear about this, Your Honor.

THE COURT: Take it easy on them. I just happened to know about that because I followed that since we sent that case to her.

MR. COOPER: Very well, Your Honor. But certainly the Blues' system --

THE COURT: They can redeem themselves by double-checking my homework. Maybe they would disagree with me on my conclusion there.

MR. COOPER: Well, we'll -- I doubt that very seriously, Your Honor.

So, Your Honor, again, we believe that the sweeping, procompetitive reforms that the settlement agreement reflects, that the Blues' system in the aggregate going forward and that

the individual features of that system going forward, including the ESAs as modified -- and I'm going to come back to that -- are not clearly illegal under the Sherman Act.

And, Your Honor, here we would emphasize two points. One of them, of course, this Court very much emphasized, and that is the national-best-efforts rules, which were, according to Dr. Rubinfeld, the enforcement mechanism ensuring that the ESAs' borders were intact and rigid, has been eliminated altogether, Your Honor. Eliminated altogether. And this Court said that the elimination of the NBE rule is a significant change -- and I'm quoting -- that will drastically alter the forward-looking landscape such that the Court's standard-of-review opinion would no longer apply. So the Court placed that much emphasis, at least preliminarily, in what it knows and what is before it in terms of the importance of the NBE rule to any competitive impact of the ESAs.

The second point, Your Honor, I want to come back to the second Blue bid. My colleague, Mr. Hausfeld, will shortly come to the lectern to discuss the second Blue bid in particular. But, Your Honor, that relief -- for the first time, health care consumers -- large, qualified national accounts, they're defined -- will have the opportunity to request and receive a bid from a second Blue plan and to determine for themselves the Blue plan from which they wish to request a bid.

Your Honor, so this opens the door to Blue-on-Blue

competition for the first time. Again, Mr. Boies emphasized how important that term was to us. We know and believe our friends for the Blues will acknowledge what an important concession they believe that was from them. So the point is the exclusive service areas are no longer completely exclusive. There's been this second-Blue-bid breach to allow Blue-on-Blue competition, Your Honor.

So, Your Honor, as we stated at the preliminary approval hearing, settlement-class counsel believed that the going-forward system, as I've mentioned earlier, is not clearly illegal. Again, if we did -- if we believed there was a feature of this that was a per se violation of the Sherman Act, we would not be able to place it before you conscientiously, Your Honor, for approval.

And that -- and we also reiterate now what Mr. Boies and what Mr. Hausfeld both said at the preliminary approval hearing, and that is we believe that any future challenge to the reformed system going forward would be tested under the rule of reason, taking into account the system's procompetitive benefits. And this Court, in the preliminary approval order, Your Honor, said -- preliminarily, to be sure, but said that it had determined -- the Court had determined that when implemented, the settlement likely will move the Blues' system from the per se category into the rule-of-reason category and that procompetitive benefits will flow from these negotiated

changes.

THE COURT: So you say the test would be that the Court need satisfy itself only -- and "only" is probably not the right word to use there -- that the Court need satisfy itself that the new system likely would be evaluated under the rule of reason.

MR. COOPER: Your Honor, I --

THE COURT: And that it would likely not be a per se violation, or is that going too far?

MR. COOPER: I don't think that's going too far. I think the only --

THE COURT: You would say it's not going far enough.

MR. COOPER: Well, I think that would be the only question. I don't think there's a question on the other end of that whether -- saying it would likely be judged by the rule of reason, I don't think that is going too far. I think it is a legitimate question whether or not -- and here's the point, Your Honor.

THE COURT: I'm just trying to --

MR. COOPER: This is a binary --

THE COURT: -- translate this case to the Eleventh Circuit's language in *Bennett* that unless the illegality of an arrangement under consideration is a legal certainty, the mere fact that certain of its features may be perpetuated is no bar to approval.

Well, if there's at least -- does that mean it should

be likely that it is not illegal? Does that mean that the Court cannot say, as a matter of law, that it's illegal? And maybe those are -- maybe that's the "per se" definition: As a matter of law, this combination of restraints is illegal; we don't need to evaluate the pro- or anticompetitive effects of them.

MR. COOPER: That's the definition of a per se violation, Your Honor. And that's what I think -- and because a per se violation is a violation that is presumed, irrebuttably, to violate the antitrust laws, if there is one that is before you, you believe, you've concluded, then you can't accept that settlement.

And this is a binary inquiry. This -- in other words, if it's not a per se violation, then it perforce has to be judged under the rule-of-reason standard. That's what's left. That's the presumptive standard in cases. It's only in these rare per se violation contexts that the law doesn't require the parties to put on evidence to support that the anticompetitive effects outweigh any procompetitive effects.

And, Your Honor, we've ourselves kind of gone round and round on whether saying that something that is clearly illegal is different from saying something is a per se violation. And we haven't been able to come up with an articulable --

THE COURT: Distinction between the two

MR. COOPER: -- distinction. We haven't. And so -- and if the Court concludes that it does not believe, as both

sides now believe, that this settlement does not perpetuate clearly illegal conduct, it does not perpetuate a per se violation, then it follows your -- that's the same as making the decision because it is a binary choice that it is a -- that going forward, the system will be judged by the rule of reason.

Your Honor, we've already trudged through my slide number 50, and we've already discussed at some length the advisory opinion point. I don't think I have anything else to offer the Court on that. And, Your Honor, I think we've already, as well, discussed the points that are made on slide 52.

So I'm going to now wrap up by making a comment about the monitoring committee because we think it's -- the objectors' concerns about the monitoring committee are not well taken. The committee is not empowered to approve, much less to immunize from antitrust scrutiny, any new restraints, any new arrangements, or new forms of conduct adopted by the Blues that are unrelated to the practices that have been challenged here in this case and that have been now modified, if the Court approves this settlement -- will be modified by the reforms that are before the Court. Rather, the monitoring committee's review is limited to rules and regulations that implement the injunctive relief provisions of the settlement.

And so this, Your Honor, also gets back to another argument that the objectors have made when they say that this

sanctions and that this violates public policy because it handcuffs them from bringing antitrust claims in the future.

Your Honor, the cases that they cite -- and I guess I am coming back to slide number 52. But the cases they cite on that point, they do not bar the enforcement of a release where the future conduct alleged to be unlawful flows from continued adherence to restraint that was the subject of the release. Rather, all those cases make clear that a release cannot bar future antitrust claims that arise from allegedly illegal conduct that differs from -- that goes beyond, that is new conduct different from the conduct alleged and challenged in the lawsuit and, therefore, covered by the release.

In other words, to quote the Supreme Court's decision in *Lawlor*, which they rely on, but only new antitrust violations not present in the former actions cannot be -- cannot be released, Your Honor, by the parties.

And so, Your Honor, with those points about the objectors' arguments that I've addressed, I will subside unless the Court has some questions.

THE COURT: I don't. I guess my question would be this. Should we take the lunch break now?

MR. COOPER: Your Honor, that's an easy one to answer, I believe. Yes, sir.

THE COURT: All right. Then the second question would be this. Before we move in -- so I know y'all have a carefully

negotiated agenda and order of presentation. I wonder, if we start tackling these issues on an issue-by-issue basis, if it wouldn't make sense to let the objectors respond to what you've said, limited to this presentation, or have them hold all their water until the end. Is there a preference there? It would help me if I'm hearing tit and tat --

MR. COOPER: Sure.

THE COURT: -- in conjunction with each other so I can not have to remember back what Mr. Cooper said a few hours ago.

MR. COOPER: So let it be said; so let it be done.

THE COURT: All right. And I think if the Blues would like to respond on the ESAs -- they are, after all, your new system if this is going to be approved --

MR. ZOTT: Right, Your Honor. And it probably makes sense for us to take a few minutes before the objectors go so they can get the full scope of the argument.

THE COURT: That's what I was going to suggest.

MR. ZOTT: Right. I'm happy to do that.

THE COURT: When we come back from lunch, Mr. Zott, you'll be up for --

MR. ZOTT: Very good.

THE COURT: -- you know, whatever period of time you need. And then we'll hear from the objectors on ESAs and structural relief objections going forward. And then we'll come back and Mr. Hausfeld will take the next subject, which I think

is second Blue bid.

MS. BOJEDLA: Yes, Your Honor.

MR. ZOTT: Very good.

THE COURT: And we'll follow that same format there.

MR. ZOTT: Thank you, Your Honor.

THE COURT: Now, a few scheduling matters. I'd say let's aim to be back at 1:50. That's an hour and six minutes. I think everybody knows from my last nine years I'm a lot better in the afternoon if you let me get my run in at lunch, so I plan to take a run at lunch real quick.

Second of all, I do have one limitation. I'm supposed to be somewhere at six o'clock tonight about 30 minutes from here. So I think we ought to plan on breaking about 5:30. I realize that's squeezing things a little bit into tomorrow, but we'll get started at nine a.m. in the morning.

I couldn't -- I know there was an expression of interest in moving us up to nine o'clock this morning, but I felt like we had already given notice to everyone, sent out the link, the telephone numbers. So I thought it was important to start when I said we were going to start. I think I've got a little more discretion about when we start tomorrow. Okay? Fair -- everyone -- satisfactory with everyone?

MR. COOPER: Yes, Your Honor.

THE COURT: All right. See you back at 1:50.

(Recess at 12:45 p.m. until 1:56 p.m.)

THE CLERK: Remain seated, please.

THE COURT: Okay. Mr. Zott, I think you're up.

MR. ZOTT: Thank you, Your Honor. Good afternoon, Your Honor.

Your Honor, this has been a long, tough battle over nine years to get to the point where we are today. The subscribers' settlement, as has been very capably described by subscribers' counsel, including Mr. Boies, Mr. Cooper, Mr. Hausfeld, has been the product of extremely hard-fought arm's-length negotiations over six years overseen by two mediators as well as Special Master Ed Gentle. And as we said at the preliminary approval hearing, we're all especially indebted to Special Master Ed Gentle for the tireless service that he performed in getting us to the point where we are today.

The standard, as we've also heard, is fair, reasonable, and adequate. The standard is not if the settlement is perfect or if it's optimal or if it could be better. Settlements are human endeavors that involve compromise. Lines have to be drawn. And wherever a line is drawn, someone can object and say it's drawn in the wrong place.

But here, given the size of the classes and the magnitude of the litigation, there were very, very few objections; as Mr. Hausfeld put it, one in a million, the majority of those from a single firm. And we think that fact alone is powerful testament to the fairness of the deal. Like

the subscribers, we believe that the case and the settlement easily meets the hurdle of being fair, reasonable, and adequate both under Rule 23 and under the *Bennett* factors.

Given the structure we're going to follow today, Your Honor, I'm going to address really ESAs. I think that's the current task at hand. And then I can address the other issues down the line.

I think we've sort of beaten it over the head; but just to be clear first, that this decision, as Your Honor noted, I think correctly, it's not an advisory opinion. I think everyone agrees that the Court cannot approve this settlement if it perpetuates clearly unlawful or per se unlawful conduct. The objectors state that explicitly, and they're right about that.

A settlement, as Mr. Cooper noted, that perpetuates per se unlawful conduct, by definition, is not fair, reasonable, and adequate. So it's part of Your Honor's overall review under the fair, reasonable, and adequate standard to ensure that the settlement does not perpetuate clearly illegal conduct. For that reason alone, it's not advisory. It's part of the review and the decision the Court has to make.

Beyond that, the issue has been explicitly joined by the objectors who have said explicitly they think that the settlement does continue per se unlawful or clearly unlawful conduct, so it's been put at issue.

And then lastly, Your Honor, you're not being asked to

decide the ultimate merits. You're not being asked to ultimately rule on the legality or illegality of either service areas or the go-forward system. You're simply being asked to decide that they are not per se unlawful and, therefore, instead, subject to the default rule of reason.

In terms of the challenge that the objectors have brought that service areas alone remain per se unlawful, a couple points to put it in context, and then I would hit on a few points after that, Your Honor.

First, everyone recognizes that the Court's prior decision dealt with the aggregation of service areas and NBE, so the Court has not addressed the legality of service areas alone or the standard that should be applied to them as well as the go-forward system with all the changes that are being made. We also heard from the subscribers -- and they're right -- that although the objectors now claim that service areas alone are per se, they have been public knowledge for many decades and they've been actively litigated for nine years and yet no objector -- no one here today has come forward and suggested that service areas alone are per se unlawful.

The subscribers' expert, Professor Rubinfeld -- recall at the preliminary approval hearing, he submitted a declaration where he said with the changes being made, and particularly the elimination of NBE, it directly addressed the competitive restraints that he had earlier criticized and earlier had

concerns with. And he recognized procompetitive benefits going forward.

THE COURT: So let me ask you a question.

MR. ZOTT: Sure.

THE COURT: And pretend -- I think I've played this video before for y'all. It's the Michael Scott *Office* video where -- the Surplus episode where it says, explain this to me like I'm an eight-year-old. Then he has to back up and say, explain it to me like I'm a five-year-old.

(Brief interruption)

THE COURT: Okay. So let's talk about NBE and green business/Blue business distinctions, if any. All right?

MR. ZOTT: Sure.

THE COURT: Obviously, elimination of national best efforts allows what we've been referring to as green businesses to go into other exclusive service areas and compete directly with Blues in their ESAs.

MR. ZOTT: Correct.

THE COURT: Is the -- how many green businesses are there among the various plans?

MR. ZOTT: Well --

THE COURT: I take it not all of them have a green business.

MR. ZOTT: No, no. And in part, as the subscribers point out, the argument is that, as they would maintain, it's

because of the existence of the rule, that the existence of the rule has discouraged the development of green businesses.

THE COURT: So the first thing is --

MR. ZOTT: That's the claim.

THE COURT: -- at least theoretically --

MR. ZOTT: Right.

THE COURT: -- we would expect there to be more green businesses going forward with the elimination of national best efforts.

MR. ZOTT: That's the assertion. That's what their experts have attested to that that's their full expectation. Correct.

THE COURT: All right. So pick -- let's pick an example of a Blue business that has had a green business. And can you, for hypothetical reasons -- I'm sorry -- for anecdotal reasons, can you name one for me?

MR. ZOTT: Blues that have had green businesses in the past. Yeah, I think there are Blues that currently have green business and have had it in the past. And I can try to come up with some names, but I don't want to get the names wrong. But I know it exists. I know it exists and it existed in the past as well.

THE COURT: Is the green business a separate actor in the market, or is it just a separate corporate entity operated by the same actors?

MR. ZOTT: Well, yeah. I think the green business would be a separate -- a separate -- I think it's fair to characterize it as a separate actor. I mean, it would ultimately be owned -- ultimately, I think, by the ultimate parent, but it would be an independently -- a business that would be run to compete directly with other Blues on an unbranded basis. Ultimately, it would probably roll up to the same ultimate parent.

THE COURT: But when we say that there will be increased competition, are we saying that there will be increased competition because green businesses can go in and complete with Blues, or are we saying that Blue businesses in an exclusive service -- in exclusive service area one can develop green businesses that go into exclusive area two and compete with Blue businesses, or is there a distinction between those two?

MR. ZOTT: I think what we're saying is that any plan, any of the 36 plans, can develop a green -- unbranded health insurance and go anywhere in the country and compete directly with Blues on that basis. So they can do any other service area or, if they so choose, in their service area, although that's probably unlikely for other reasons.

THE COURT: Okay.

MR. ZOTT: And so you've sort of --

THE COURT: And so that's looking at it from the lens

of the ESA sending a green business into an exclusive -- different exclusive service area. If we look at it from the lens of the Blue that's in the second exclusive service area, the point is these rules will enable increased competition for them to deal with in their exclusive service area.

MR. ZOTT: Correct. That's exactly right. Right.

And you sort of, Your Honor, got to the first -- sort of the first justification going forward for why service areas, standing alone, are not per se. And that's because before, we had the aggregation of service areas and national best efforts; but once you eliminate the national-best-efforts restrictions, then it returns the service area rule to what, at its root, it has always been, which is their trademark rule. You're basically not limiting competition among plans because they can compete on an unbranded basis anywhere they want. All you're saying is that with respect to the use of the brand, with respect to the use of that trademark, they're restricted and they can't use it in a way that would violate other plans' rights. So...

THE COURT: You heard me reference Judge Bucklo's decision.

MR. ZOTT: I did.

THE COURT: And you're familiar with that decision.

MR. ZOTT: I am.

THE COURT: That is in your backyard; right?

MR. ZOTT: It is. I've been in front of Judge Bucklo, and I have great respect for Judge Bucklo.

THE COURT: Now, I told you guys -- "you guys" in its gender-neutral sense -- three years ago you didn't have to take one district judge's word for it. That's why I certified your appeal to the Eleventh Circuit and let you take me up on the standard-of-review order.

MR. ZOTT: Right.

THE COURT: And I think similarly, we don't have to take one district judge's view for it here, but I'm curious what you think of that particular opinion and what I should make of it.

MR. ZOTT: Well, I think the key takeaway from that opinion is that it comes in a different procedural posture than we are today. That was a motion to dismiss. And so it was very much where we were, Your Honor, I guess five or six years ago when your Court was called upon to decide whether or not the per se claim stated a claim. And the Court held it did state a claim.

And that's all that Judge Bucklo held. She basically held that under the governing legal standard, they made a plausible allegation and they put the right words on a piece of paper; and so therefore, she could not grant the motion to dismiss.

THE COURT: Under *Twombly*, with its --

MR. ZOTT: Correct. But that's all it is. It's on a dismissal. It's not with a full record. She didn't have the ability to assess procompetitive benefits. She didn't have the discovery record. She didn't have experts. It was simply a motion to dismiss, which is the lowest threshold to get across. I think that's the key takeaway from that case.

Okay. So, Your Honor --

THE COURT: Maybe Mr. Cooper's associates are saved after all.

MR. ZOTT: Yeah, maybe so. That's what Mr. Cooper meant to say earlier. I think that's where he was heading with that. But that's our view. They may have a different view, obviously. You know, I don't speak for them.

So the first thing is without NBE, service areas get returned to their roots as really a restriction on brand use, not on competition, because competition is free now. You can compete anywhere you want on an unbranded basis.

And cases like the *Clorox* case, which Your Honor relied on in the first standard-of-review decision, the later Second Circuit case, the *Contacts* case, which follows *Clorox*, made clear that trademark restrictions are generally not a problem because they're not exclusionary. They don't prevent competition. They just prevent the use of a brand, not competition. And for that reason, they're favored. So that's issue one. And, in fact, in those cases, the Second Circuit --

not only did it have no problem applying the rule of reason, but it actually sustained those restraints as a matter of law.

Now we're not suggesting, Your Honor, that you need to or should go that far. All you need to do here, in our view, on final approval is to determine that service areas are not per se unlawful but subject to the rule of reason, and that's it. You don't have to go further and then evaluate their legality under the rule of reason. We think that would have to be an issue decided in the future. I think you asked that question earlier, and that's our view of where you need to be.

THE COURT: Well, and I might even tweak it a little bit more to say I have to evaluate whether this structure -- before, I think your side particularly would like me to have isolated ESAs on the standard-of-review order and give a thumbs-up or thumbs-down on them, and I declined to do that then because I said that's not the case.

MR. ZOTT: Yeah.

THE COURT: The case is that there are other output restrictions that you have to factor into the analysis.

Well, here if there are inputs that factor into ESAs, those have to be considered in terms of evaluating the structure of the structural relief; correct?

MR. ZOTT: Yes. I think it's right that you'd be looking at the system going forward.

But having said that, let me also say this. The

settlement does continue ESAs. They are -- in paragraph 13, it says they're going to go forward. And I think that if Your Honor had concerns that the service areas remained per se unlawful, even without regard to the other elements, I think that -- I think you would -- you should rightfully be reluctant to approve the settlement. I don't understand how -- you know, you would be relying on some offsetting, you know, feature of the system to get it through rule of reason.

THE COURT: Well, I appreciate that.

MR. ZOTT: Yeah.

THE COURT: That tells me you're not running away from them.

MR. ZOTT: Not at all. We think that -- we think that they are independently not per se unlawful, but rule of reason. And I think that any judge -- but Your Honor I know is very responsible -- would want to be comfortable before you approved it.

The second -- so the first reason is this point, without NBE, we're really talking about a trademark restriction, not a competition restriction.

The second point is that the Blues' history, whatever else we can say about it, it's truly unique, and there is nothing in history or in law that is like the Blues. For example, there is no question that the service areas arose originally through common-law trademarks. That plan developed

independently in different service areas. As Your Honor noted in your last ruling, the preliminary approval ruling, those were then rolled up into a, you know, licensing entity and then licensed back to the plans. And those licenses recognized the preexisting common-law rights.

So it would be very difficult to say that those service areas were a simple, naked horizontal agreement among competitors. In fact, it seems obvious that they would have to be viewed as being ancillary to a cooperative venture among various plans to offer products that they could not do alone and thereby increase interbrand competition. And that's the core of the procompetitive justification.

So then the third point, Your Honor, is that once you eliminate NBE and you're sitting with ESAs alone, you can proceed down the well-trodden path that courts have followed for decades in evaluating the restraints, including the path Your Honor followed with respect to BlueCard. Service areas facilitate cooperation integration. They allow plans to cooperate in order to offer products, like nationwide coverage as well as an individual, local focus, that no one plan could do on its own. And that increases interbrand competition, and that's procompetitive. Those justifications, as I really think not just our experts but, really, where Professor Rubinfeld is today, would take this case out of the per se rule and into the rule of reason.

You know, the last point, then, Your Honor, is *Sealy* and *Topco*. And I think the starting point there is what Your Honor recognized in the preliminary approval order and your earlier 1292. It's true that those cases have not been expressly overruled. Absolutely. But it's also true, as Your Honor noted, that their continued precedential value has been called into question both by later courts and by commentators.

What that means is at a minimum, they should be carefully applied and construed narrowly. *Sealy* clearly is not on point because *Sealy* was an aggregation case. It involved an aggregation of both a straight horizontal allocation plus price-fixing. That's not what we have here.

Topco involved a history that's entirely different than the Blue history. It didn't involve preexisting common-law rights that already conferred exclusivity and were rolled into a later license agreement. And it didn't involve the kind of cooperative integration of activity that allowed a group of plans or defendants to create something that none of them could create on their own and thereby have another national competitor to compete against the other big three national competitors. The case did not involve that.

So lastly, Your Honor, I wanted to address -- if I haven't already, at least I've implied it. But you mentioned *Bennett*, and you mentioned how far should I go and how far should I not go. So just to be very clear, we think the right

place for the Court to be is to find that service areas alone as well as the overall Blue system going forward are not per se unlawful and, therefore, subject to the default rule of reason given potential procompetitive justifications. At the same time, we're not suggesting that Your Honor should go further and actually engage in the balancing act under the rule of reason. We think that's going too far, and we actually think the case law says you shouldn't go that far.

Now, *Bennett*, it uses that language "clearly illegal to a legal certainty." And I think it's the "legal certainty" language that Your Honor was raising earlier and does that somehow mean all you have to do is find likely or not likely.

But the issue with *Bennett* is twofold. First, *Bennett* cites back to *Grunin*. *Grunin* is the lead case, and that's really the case that the other cases follow. In *Grunin*, it didn't -- it did have that "clearly illegal" language. But then in the very next sentence, it says -- because it's not clearly illegal to a legal uncertainty, then the court goes on to say it's not per se unlawful, and so it's subject to a rule of reasonableness under the settlement. So right after the court mentioned the legal certainty language, it went on to say not per se, therefore, subject to a reasonableness test.

My point is the words "clearly unlawful," "per se unlawful," or "legal certainty" are equated throughout that decision. They mean essentially the same thing. *Robertson* came

along after that, another similar case; said exactly the same thing. It used that language, but it said because no court has found these practices to be per se, I can sustain the settlement going forward.

The last thing about *Bennett* is *Bennett* was not actually a per se case, and so the court didn't have to grapple with exactly the issue you're dealing with here. In that case, it was a tying claim involving a small Florida developer. So by definition, for tying to be per se, you have to have market power; and there's no way that that Florida developer had market power. And there's no discussion of per se.

What was happening in that case is the objectors wanted the court to make the ultimate merits ruling. They actually wanted the Court to find and decide on the ultimate legality of the go-forward conduct because it wasn't a per se versus rule of reason. And it was in that context that the court says we don't need to go that far as long as it's not illegal to a legal certainty. It's citing back to *Grunin*.

So I hope that's helpful and clear, Your Honor.

THE COURT: It is.

MR. ZOTT: And if you have any questions -- otherwise, I'm happy to yield at this point.

THE COURT: All right. I guess we'll hear from any objectors that are challenging this area.

MR. ZOTT: Thank you, Your Honor.

THE COURT: Thank you.

MR. SLATER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. SLATER: Paul Slater on behalf of what has been called in the papers the Alaska Air movants.

Your Honor, we are 40 national ASO accounts. Of those, 26 are corporate-sponsored entities, nine are Taft-Hartley plans, and seven are church plans. The church plans and the Taft-Hartley plans, of course, were excluded by the current settlement that's before the Court from receiving a second Blue bid.

Your Honor asked for comment with regard to the exclusive service areas and by which I understand you to mean the horizontal territorial allocation amongst the defendant Blues whereby each agrees that it will not invade the other's territory by the use of a Blue mark. And I actually had four things I wanted to address today. Each of them relate to that topic.

THE COURT: All right. Thank you.

MR. SLATER: And the four things I'd like to discuss is, first, whether the per se rule applies to the conduct going forward. The second thing is something I think I probably don't need to discuss anymore. I wanted to address the propriety of an injunctive relief class that granted divisible or individualized relief.

THE COURT: Are you satisfied with the way we're handling that, at least as articulated today?

MR. SLATER: I would say encouraged but not satisfied, because I don't know what it entails. We --

THE COURT: Well, what it would entail is resending notice to the ASOs, having a (b)(3) divisible relief class -- now, I think it's called something else in the papers, but that's essentially what I understand it would be.

MR. SLATER: The (b) --

THE COURT: That distinguishes it from a (b)(2) indivisible relief class and a (b)(3) damages class, so this fairly unique creature in the law, perhaps. And then we would -- then you can either opt out, and that gives you the full right to pursue not just a second Blue bid but a third or fourth or all of the Blue bids in litigation. The limitation would be that the claim cannot attempt to relitigate, if the settlement is approved, any aspect of the (b)(2) injunctive relief.

MR. SLATER: Your Honor, I've spoken with several class counsel, several of the defense counsel, and I think there were some significant differences between what I was told by each one of them. Nobody was exactly sure --

THE COURT: Well, maybe you're talking to the right person, then.

MR. SLATER: That's good. Thank you.

My question is this. If the release of the claim that the horizontal territorial allocation is unlawful, be it pursuant to the rule of reason or per se rule, if that release is left in a (b)(2) class that I cannot opt out of, then how do I bring a claim in the (b)(3) or in a courtroom to the effect that I have not released that claim? In other words --

THE COURT: I think you've not released your claim that, under the new structural relief, you should be entitled to a second Blue bid or that you should have the right to pursue other Blue bids.

MR. SLATER: Okay. And the merits of that claim, as I understand it, would be that the territorial allocation is unlawful pursuant to either rule of reason or per se rule and that because of that, I'm entitled to injunctive relief to preclude the Blues from not granting me up to 36 -- since there are 36 Blues -- new bids. And my question is am I completely free in my injunctive relief lawsuit that I'm allowed to bring to pursue any relief that is allowable at law?

THE COURT: Specific to your client.

MR. SLATER: No.

THE COURT: No. I'm answering your question.

MR. SLATER: Oh.

THE COURT: Specific to your client.

MR. SLATER: So I would be --

THE COURT: You would not be able to go back and

represent essentially what would be -- and again, this is all hypothetical. If the settlement is approved and if the (b)(2) injunctive relief class is approved and that class is certified, you would not be able to go back and relitigate on behalf of that entire class, other people who you don't represent. So think about this -- maybe -- I don't know if this is the perfect analogy, and I'm a little worried about throwing it out there because I haven't thought it all the way through, but let me give it a shot.

MR. SLATER: Please.

THE COURT: Think about -- what would you be entitled to do under the All Writs Act? You would not be able to go back and attack the judgment. You would be able to go back and litigate claims that are unique to your client, that your client possesses, that are not inconsistent with the (b)(2) class. And if you've opted out of the divisible relief aspect of things -- and that would include the second blue bid; everyone agrees with that -- then I think you can argue that my client -- or clients in this situation are entitled to get multiple Blue bids, up to 36. The Blues are going to have to defend that action, but they're not going to have to defend that action across the waterfront. It's going to be only defend that action as to your boundaries. They're only fighting over your beachfront property, not the entire oceanfront.

Now, let me -- before you answer that, let me ask class

counsel and the Blues counsel if you disagree with any aspect of that hypothetical.

MR. ZOTT: A little bit, Your Honor. Let me say --

THE COURT: Well, that's why it's a good thing you're all talking to me.

MR. ZOTT: I appreciate that, Your Honor. Let me start with the -- there's two issues. I'm going to take them in reverse order. So let me start with what an opt-out of -- we're now going to -- I can properly and correctly put the second Blue bid -- because it's divisible, individualized, we'll put it in the (b)(3) class.

THE COURT: Right.

MR. ZOTT: So that means that if somebody exercises their opt-out rights, they could seek -- obviously, they could seek damages in any amount, including damages flowing from ESAs or anything else. Then they could seek individualized injunctive relief, including a second Blue bid. I think they could probably seek multiple Blue bids. But I think that at the same time, they remain bound by the (b)(2) -- by the (b)(2) release.

THE COURT: I thought that's what I said.

MR. ZOTT: You did say that, Your Honor. But here's what I don't think they could do. Because they -- as a member of the (b)(2) class, which is not an opt-out class, it binds each and every one of them individually. It binds them all in

their individual capacity. So if they decide that they're going to just bring an individual lawsuit and they say -- let's just take the extreme case -- I would like an injunction against service areas, I don't think they could do that because they released that claim as part of the (b)(2) class. They are a member of the class. They released to the full extent permitted by law. Because ESAs are classwide, a classwide policy that cuts across the class, that claim is released. So they can't do that.

Now, instead, they say, fine, I'm not going to do that; I want to seek, but I want to seek 36 bids. See, I think at some point, what's happened is although they're not calling the relief -- you know, I'm not seeking an injunction as to ESAs. Effectively, if you can get 36 bids, then you've just basically -- you've violated the rule of ESAs. You're basically saying I'm entitled to competition from all 36 plans. I think that would violate the (b)(2) release because, remember, that release would apply to everyone, including that claimant.

THE COURT: Well, I don't know that any court could require a Blue to bid on business.

MR. ZOTT: No. They couldn't.

THE COURT: But the distinction, it seems to me, is they can argue that there should not be any restriction from any Blue bidding on our business, as far as competition would be exclusive-service-area Blue that otherwise would be the sole

bidder.

MR. ZOTT: Well, but if their argument is there should be no restriction on any Blue's ability to give a bid to me, service areas impose that restriction right now. And so they would basically be saying, at least as to me, you shouldn't enforce service areas; but they've already released the claim that they can challenge service areas.

THE COURT: Yes.

MR. ZOTT: That's gone. So what they could do, though, is they could say I'm entitled to two bids or three bids or four bids. The point will come, though, I think, when they would be crossing the line from what's legitimately individualized relief to what's really just a backdoor way of --

THE COURT: So how do we articulate and define that so that it's clear?

MR. ZOTT: I think the best formulation -- we've worked on this too, quite a bit, and we can work on the language more, Your Honor. But so, again, without binding, I think it's something along the lines of they would be able -- an opt-out could seek individualized relief, including a second Blue bid or any other individualized relief, to the fullest extent permitted by law provided it doesn't violate the (b)(2) release. I think somewhere in there --

THE COURT: Is this going to be like Justice Potter Stewart's definition of pornography? We can't tell you what it

looks like for it to be indivisible, but we'll know it when we see it?

MR. ZOTT: Well, it's a little -- here's the issue. I think for a court to draw the exact line of when something goes -- crosses the line from being legitimate individualized divisible injunctive relief to really violating the (b)(2) release, it probably should be done in a specific factual context where the issues are joined and the litigants have an opportunity to present their case.

I think it would be hard for Your Honor today to say precisely where that line is. I think, though, you can come up with language that embraces both points legitimately and effectively and fairly in a way that's consistent with the law.

THE COURT: Well, and what gives part of the audience pause and part of it comfort is it seems like I'm the one who's going to be having to decide that on a case-by-case basis --

MR. ZOTT: I think that's correct.

THE COURT: -- because I have to enforce the integrity of my judgment if I end up entering a judgment.

MR. ZOTT: That's exactly right, Judge. It's exclusively in your hands.

THE COURT: Yes. I think -- and, again, All Writs Act.

MR. ZOTT: Yes, sir. So does that make sense what I said, Your Honor?

THE COURT: It does. And maybe that's not what I said

earlier this morning, but that's what I intended to say is I wonder if there's a way to call -- just distinguish divisible relief that doesn't overly limit a class member's right but doesn't allow them to go in and assail the entire judgment at the same time. Just --

MR. ZOTT: Yeah. You used words earlier --

THE COURT: And it sounds like I've got smart groups on both sides continuing to work on this issue.

MR. ZOTT: So there's one last point I want to address since you asked for any other comments. Your Honor, so we have a (b)(2) class that's indivisible classwide. You have a (b)(3) divisible class. And that would -- but one, I think, slight distinction that -- is we think there should be a single (b)(3) class. That is, it should simply be a (b)(3) class that includes both damages as well as any other -- because that's individual relief -- as well as any other individual relief, such as individualized injunctive relief, rather than two (b)(3) classes.

And part of that is because the settlement has already -- at great negotiating effort and great angst, we've already properly defined an injunctive class and, really, a damages (b)(3) class. Now, we didn't use the nomenclature of (b)(3), and probably that -- you know, in retrospect, that would have been a little better to do that. But they've already been defined, and the members of both of them have been heavily

negotiated and defined. I think to now sit down and create an additional class of (b)(3) individualized relief, it's not necessary because it's already in the settlement, and it also could create problems.

For example, who would be in that? And if somebody is not in that class, then they wouldn't be giving us a release. That is, if they're not in there and they don't opt out, they're not giving us a release anyway because they're not defined to be within the class. That would be an issue that we've already --

THE COURT: Well, we're not dealing with a fourth class. We're dealing with opt-outs; right?

MR. ZOTT: You're dealing with opt-outs; but I think if you define a class, you need to give, you know, an opportunity.

THE COURT: Sure.

MR. ZOTT: But if somebody isn't within the scope of that class, depending upon how you define it, you don't have to --

THE COURT: Yes. We have to define it well so we know whether you have a -- you're in the class such that you can opt out of it, clearly.

MR. ZOTT: Correct. And what I'm saying is we already have a well-defined damages, slash, (b)(3) class that's already been hammered out. And I think subscribers would agree that the most straightforward way is to simply have a single (b)(3) and a single (b)(2) but then to clarify this issue that we've got

here, which is, you know, the issue about where does the second Blue bid fall. I think we need to do that, Your Honor, for all the reasons under *Wal-Mart*, but I don't think we need to create two (b)(3)s.

THE COURT: So your argument is we don't need a (b)(3) divisible relief class. We just need a (b)(3) class. Damages and divisible relief both can fit neatly in it.

MR. ZOTT: Yes. Because by definition, it's divisible both as to damages and injunctive relief.

THE COURT: We'll see. I'm not sure.

MR. ZOTT: Okay. Understood. I wanted to put it down, though, because you wanted all the --

THE COURT: Yes. That's right.

MR. ZOTT: Thank you, Your Honor.

THE COURT: Does that help you at all?

MR. SLATER: Well, it helps me understand, but I have multiple problems with what was just said.

THE COURT: Okay.

MR. SLATER: First, I don't think you can separate the release from the relief. If the relief to which is predicated on the horizontal territorial Blues allocation is going to -- if the relief addresses that claim, if I opt out of that relief, I am opting out of that claim.

THE COURT: No.

MR. SLATER: You can't leave the release --

THE COURT: No. You can't opt out of a (b)(2) class. And that claim is solidly in the (b)(2) bucket.

MR. SLATER: Well, we have filed a motion to opt out of the (b)(2) class, and we have a number of arguments on why we can't properly --

THE COURT: Well, I will have to address all those arguments.

MR. SLATER: -- be held in those.

THE COURT: Hold on. Hold on. I will have to address each of those arguments. But if you don't prevail on those objections and the (b)(2) class stays as is with this possible distinction of divisible relief moving over to (b)(3), then you're not going to be able to go back and attack the (b)(2) relief granted to the class. You will have lost that objection to your -- what you will do is have a ticket to Atlanta.

MR. SLATER: No. I --

THE COURT: But save reversal there -- unless I don't approve it and unless you get the approval reversed at the Eleventh Circuit, I don't think your clients are going to be able to come in and relitigate (b)(2) issues.

MR. SLATER: Your Honor, I understand that.

THE COURT: Yes.

MR. SLATER: My point is this. If I opt out of the (b)(2) relief, in order for me to bring a claim to get one, two, three, four, or 36 additional Blue bids, I have to have that

claim unreleased. So I have to be able to say to a court, I have not released my claim that the horizontal territorial allocation is per se illegal and I assert that claim and I say that I am entitled to injunctive relief that, at a minimum, allows me to go to every one of the 36 Blues and get a bid.

Secondly --

THE COURT: Well, wait. I think that's where we're breaking down a little bit. You don't have a right under any circumstance to get a bid from a Blue.

MR. SLATER: If I --

THE COURT: The Blue has to be willing to --

MR. SLATER: Fair.

THE COURT: -- offer the bid.

MR. SLATER: I misspoke, Your Honor.

THE COURT: So the question isn't whether you have a right to -- and even under the settlement, no one has a right to a second Blue bid. They have a right to seek --

MR. SLATER: Point taken, Your Honor.

THE COURT: -- see if anybody is willing to give a second Blue bid.

MR. SLATER: You and I are on the same page. I misspoke. I was talking about the right to seek a second, third, fourth --

THE COURT: Okay. We're -- I need not say anything further, then.

MR. SLATER: Okay.

THE COURT: I'm just making sure we were on the same page there.

MR. SLATER: No. We are. I misspoke.

So I have to have that merits claim in order for me to proceed and claim that the conduct is illegal and that I want the conduct enjoined so that I can go and request --

THE COURT: Well, are you seeking -- are you seeking that relief on behalf of anyone other than your particular client?

MR. SLATER: That's the second issue I wanted to get to. There are cases -- and I have not consulted with my economist or my clients on this. We heard about placing this relief into the (b)(3) class for the first time as we sat in your courtroom this morning, so I haven't checked this with my clients or with my economist.

There are certainly antitrust cases -- and I've been involved in many of them -- where the claim for injunctive relief was marketwide even though the claimant was not a class and even though the claimant was only asserting rights for himself. And the reason for that is that in certain circumstances and situations, in order for the client to get the benefits of competition, competition has to be opened up marketwide.

THE COURT: So if one of your clients had actually

filed a suit, not even on behalf of a class, but just -- who's your lead -- Alaska Air?

MR. SLATER: Right. They're the first alphabetically, so --

THE COURT: Yes. Okay. That's the lead client on our docket sheet.

MR. SLATER: Yes, sir.

THE COURT: If Alaska Air had actually filed suit at some point since 1972 or 19- -- the eighties, whatever date you want to pinpoint as when this structure came into place --

MR. SLATER: Right.

THE COURT: -- you're right, they don't have to have a class. And that's one thing we've discussed with -- that was an issue we've been discussing all along during the course of this case is it doesn't necessarily take a class to get --

MR. SLATER: Not denied relief.

THE COURT: -- injunctive relief that benefits everyone because it would require the Blues to change their structure. Okay? You're right there.

Where I think you're running into the rocks, though, is hypothetically, a settlement is approved by a court that maintains jurisdiction over that settlement and then you go in and try -- even on behalf of a single plaintiff -- to try to litigate that injunctive relief claim and one of the arguments you make is the Blues have to change their structure. That's

where I think you're going to run into an All Writs Act issue.

Again, this is all hypothetical. We have to have an approval of settlement. There's got to be a final judgment.

MR. SLATER: Could --

THE COURT: But, for example, if you were -- last year -- let's say in December of last year, you went and filed the Alaska Air suit and you said, I am seeking injunctive relief on behalf of Alaska Air to have the Blues change and --

MR. SLATER: Abolish the ESAs.

THE COURT: -- abolish their ESAs --

MR. SLATER: Yeah.

THE COURT: -- I would have shut you down in a heartbeat under a different component of the All Writs Act, and that is protecting my jurisdiction to consider the propriety of the settlement. But if the judgment goes in place, we shift to protecting the integrity of the judgment. So --

MR. SLATER: That assumes the propriety of the judgment that causes me to release, in the (b)(2) class, claims --

THE COURT: Well, that's why you're here objecting. You don't --

MR. SLATER: Yes. Correct.

THE COURT: But that's your avenue to challenge, not going into a separate court and filing either a smaller-sized class or an individual claim which collaterally attacks any judgment that would be entered by this Court.

MR. SLATER: Yeah. And, Your Honor, we actually have filed.

THE COURT: I know you have. It's in front of Judge Manasco, and we're not sure exactly what to do with it yet, but we'll figure that out after this is all over.

MR. SLATER: Okay. We actually have filed the suit, and it actually does ask for injunctive relief.

THE COURT: I think I have it right here.

MR. SLATER: I'm not surprised. So another --

THE COURT: But you understand what I'm saying.

MR. SLATER: I do.

THE COURT: That's just classic All Writs Act application.

MR. SLATER: I do. And like I say --

THE COURT: And go -- if you want to, for example, see what the Eleventh Circuit thinks of this -- and you probably already know -- go look at a case like *American Home Shield*, which was my case, where counsel tried to do exactly the same thing.

They were in California, in San Diego, in state court. I had approved or was in the process of approving a settlement. They went into California state court and argued that they ought to go forward with their Rule 23 claims there. The state judge agreed with them that they could go forward. I entered an injunction saying no, you can't do that. I have -- you have to

give me time and opportunity to evaluate the propriety of the settlement. Okay?

Then they went back into the court on a second bite at the apple, the state court, and said, all right, we're not going to pursue our Rule 23 claims. We just want to pursue our California unique creature, private attorney, general claims related to consumer conduct and consumer benefits. I don't -- I'm not hitting the nomenclature right, but it was -- and I entered a second injunction and said -- or, actually, a clarification of the injunction that said no, what you can pursue is claims on behalf of a client that you have actually been retained to represent who's opted out of this settlement, and you can only pursue certain individual-relief claims. You can't pursue claims that would be inconsistent with the settlement.

Now, interestingly, I got reversed at the Eleventh Circuit on that because what Judge Per Curiam said was that I should not -- I should not have enjoined them that second time -- and I don't think I enjoined them. I think I clarified my earlier injunction, which I don't even think the Eleventh Circuit had appellate jurisdiction over the case for that reason. But anyway, they said what I should have done is gone straight to contempt and had a hearing on whether or not the party in California and the counsel were in contempt of my order.

So I think the Eleventh Circuit takes all this pretty seriously is the bottom line.

MR. SLATER: With regard to the individual claim, Your Honor said at the beginning that the individual clients would be entitled to seek injunctive relief for themselves, not for the market. And that would --

THE COURT: Not inconsistent with the (b)(2) relief, which means I -- you know, and I guess that's what we have to --

MR. SLATER: Well, I --

THE COURT: -- pencil out here is what does that mean and what does that look like.

MR. SLATER: I was told that the -- it was not contemplated that there would be a new agreement.

THE COURT: I'm sorry?

MR. SLATER: I was told that it was not contemplated that there would be a new written settlement agreement. Now, I -- maybe that's bad information I got in the hallway, but --

THE COURT: Well, there would still be my order, which is pretty good, I think.

MR. SLATER: Your Honor, the order is very good. But I would certainly -- if we are not going to be able to pursue a claim for all 36 Blues to submit a second Blue bid for a third and fourth and fifth, et cetera, to my clients, I would like to know about that in advance, because we will certainly object to that.

THE COURT: I think you are. I think that's what you're here for; right?

MR. SLATER: Well, not --

THE COURT: That's what we're doing right now, right in front of everybody.

MR. SLATER: I'm objecting to what's been proposed for today. We would also --

THE COURT: No. I think you're objecting to the -- at least as I read your objection, you're objecting to this deal.

MR. SLATER: Yes, sir.

THE COURT: You're saying this deal leaves in place what you contend is either clearly illegal or per se illegal structures and that those would be in place even if this settlement is approved. Right?

MR. SLATER: Correct.

THE COURT: So that's what we're here arguing about. Now, if you lose on that, what I'm telling you is you have one direction to go, and that's up, not sideways.

MR. SLATER: That --

THE COURT: Okay? You can't go to Judge Manasco --

MR. SLATER: I hear you.

THE COURT: -- or me, if I get that case, and say, Judge Proctor, we disagree with Judge Proctor. We should be able to pursue these claims.

MR. SLATER: Okay. The four items that I wanted to

touch on today are, one, the per se rule and whether it remains applicable; two, whether injunctive relief can be ordered that is divisible or individualized -- I believe -- well, I'm not sure where we are on that because I think some of the relief that is now contemplated would still be individualized and divisible as to my clients, but I'll get to that. I heard what Your Honor said earlier today that you regard --

THE COURT: So how do you respond to some of the things I've heard from both -- principally from subscribers, but I think the Blues have echoed it from time to time -- and that is, Judge, these objectors are coming in in the bottom of the ninth. These structures have been in place forever and a day and not one of them, institutionally or otherwise, has stepped up to the plate and challenged them.

MR. SLATER: You're --

THE COURT: And, you know, it's one thing to critique our work. We know that's part of it. But our work is being critiqued by people who never had a critique until this settlement was in place.

MR. SLATER: It wasn't until the settlement was in place that my clients were told that they were going to be compelled to release claims but were going to be treated unequally within the injunctive relief class and that they would not get a second Blue bid, including for having exercised their constitutional right to opt out of the (b)(3) class.

THE COURT: Well, and that's, quite frankly, the -- that's what spawned my concern and the need, I think, for a (b)(3) class and an opportunity for your clients to opt out, because we don't want to burden your clients' opt-out rights. And I think I am duty bound to protect that opt-out right.

I guess what we're -- now what we're arguing about is not whether they have the right to opt out. They're going to have that right.

MR. SLATER: Well, a limited right to opt out.

THE COURT: I'm sorry.

MR. SLATER: A limited right to opt out.

THE COURT: Well, they're going to have a right to opt out. They can't opt out of something they're not entitled to opt out of. They're not entitled to opt out of (b)(2), across-the-board, indivisible injunctive relief. They're just not. I mean, that's black-letter law.

MR. SLATER: Your Honor --

THE COURT: I didn't make up that rule. That rule is in place.

MR. SLATER: Your Honor has discretion to grant opt-out rights to members of a (b)(2) class.

THE COURT: Even if that were so, would it make any sense to do? Because then we might as -- you know what's going to happen? We might as well just keep litigating the case because I don't know how we're going to have a settlement if

everybody is arguing about where the line ought to be drawn.

And if the line can be drawn fairly, reasonably, and adequately, your client doesn't have a right to opt out of that except as it relates to the -- what I think is fairly divisible relief, and that is this -- because of the unique circumstance your client is in that an individual policyholder, for example, would not be in, you may have the right to seek additional bid or bids. And that's what we're having a focus on, I think, is where is the -- we've drawn the line of who gets a second Blue bid. Now we're drawing the line of what's divisible and what's not indivisible -- I'm sorry -- what's divisible and what's indivisible.

So what I'm telling you is if you are trying to convince me that you have the right to opt out of indivisible (b)(2) relief, save your words for the Eleventh Circuit. I'm not going to buy that.

MR. SLATER: I believe the relief here that we're trying to opt out of is both divisible and individualized. In *Wal-Mart versus Dukes*, the Supreme Court, in a rather brief paragraph, covered both of those items and said that (b)(2) is not an appropriate vehicle for the granting of individualized or divisible relief.

It's individualized in this case, Your Honor, because the characteristics of my individual clients determine whether they get the second Blue bid or not. How much dispersion

does -- do they have or not have? That's an individualized issue. Are they in a state that has two Blue bids? That's an individualized issue -- two Blue entities competing so they can already get two Blue bids. Are they a Taft-Hartley plan? Are they a church plan? Those entities are precluded from getting a second Blue bid solely because of who they are.

And this harkens somewhat to the brief that the Department of Labor submitted last night where they said the defendants are trying to treat the Taft-Hartley plans as if they weren't real plan member -- real class members and real entities that were the primary initial purchaser of the services that are in question here.

And the same thing is true of the argument made against the church plans and the Taft-Hartley plans. The defendants say they justified the exclusion of those plans from being able to get a second Blue bid solely by pointing to the fact that they could have been formed differently than they were formed. But they are class members and they were formed the way they are. They are the entity that enters into a direct contract with a Blue, and they can't be denied an injunctive relief provision solely because they could have been formulated differently than they actually were formulated.

That would be true of every corporate entity as well. Every corporation could be one corporate parent and 50 subsidiaries. And in that case, the Blues would be arguing,

what, that the corporate entity couldn't get a second Blue bid because they -- all of them could have formulated --

THE COURT: Well, let me ask you what happens in the typical class action, because this may be somewhat atypical in some respects. In the typical class action, when it comes to (b)(3) relief, your client has one choice to make: stay in or opt out. Right?

MR. SLATER: Correct.

THE COURT: Once they opt out, then they have a choice to make. Did we opt out on principle and we're not going to do anything about it, or are we going to actually go try to enforce our rights somewhere.

MR. SLATER: Correct.

THE COURT: And if they decide to go and enforce their rights somewhere, they file a lawsuit. Okay?

MR. SLATER: Yes.

THE COURT: And once they file that lawsuit and not until they file that lawsuit do we know exactly whether the relief they're pursuing is inconsistent with the class settlement. Right?

MR. SLATER: Yes.

THE COURT: And if you go all the way back to common-law class litigation, that's the way it worked. Somebody filed a lawsuit, the court passed a judgment, and nobody knew exactly what the effect of that judgment was until someone else

came along and filed a similar lawsuit. And then it was up to the second court to decide the effect of that.

So what's wrong with just leaving it at this for right now? Your client has a right to opt out. We don't have to get into what's fish or fowl at this point. Your client -- I'm just telling you right now as a public service announcement that if your client comes in under those circumstances and tries to collaterally attack the (b)(2) relief, I'm going to be duty bound under Eleventh Circuit law to shut it down. But I'm not -- I don't think it's my job to give you or your client advice about what that lawsuit ought to look like in light of the settlement. Why wouldn't we just leave it at that?

MR. SLATER: Your Honor, now I think what you're telling me is the agreement, the settlement agreement, is so vague that I can't know and can't advise my clients as to what they're able to do, having opted out of that settlement.

THE COURT: No. I'm just saying that why is it the Court's obligation to give you particularized advice? Why can't the settlement agreement speak for itself?

MR. SLATER: I think it's the obligation of the class to give me a clear agreement, where I know what my rights are. And if they haven't done that, then the approval of the settlement agreement should be withheld. I should not be put in a position where there's a settlement agreement that I'm not told what the terms are and what the impact would be on any

clients.

THE COURT: Well, you know what the terms are.

MR. SLATER: Well, I don't know what they mean.

THE COURT: No. You know what the terms are if you stay in the class on the divisible relief. You know how we're going to generally calculate --

MR. SLATER: But I don't know what the release means.

THE COURT: Excuse me. You know generally how we're going to calculate the damages.

MR. SLATER: Yes.

THE COURT: You know what the criteria are for you to get a second Blue bid. Okay. And if you stay in the class, you're releasing any and all claims under the act; right? If you stay in the class --

MR. SLATER: Yes.

THE COURT: -- and don't opt out.

MR. SLATER: Yes.

THE COURT: All right. So I don't think it's accurate to say you don't know what the terms of the settlement say.

MR. SLATER: I don't know what the terms of release are.

THE COURT: Any and all claims if you stay in.

MR. SLATER: No. If I opt out. I don't know what --

THE COURT: If you opt out, now, that's -- okay. So let's go. Because I was --

MR. SLATER: Yes.

THE COURT: All right. If you opt out --

MR. SLATER: If I opt out --

THE COURT: -- you are bound by the (b)(2) relief, and you're free to pursue what would be categorized as (b)(3) relief in an individual action on behalf of yourself, no one else.

MR. SLATER: And what does that entail? Does that entail bids from all 36 of the Blues?

THE COURT: We just said you're not entitled to that. You conceded that earlier. You're not entitled to --

MR. SLATER: If I stayed in the class, I would be. I don't think I can be --

THE COURT: No, you would not. No, you would not.

MR. SLATER: Your Honor, I don't think my clients can be compelled to release claims from a class that they're opting out of. If they are opting out of the (b) --

THE COURT: You're not opting -- so, look, we're -- Okay. I'm about to move along here, but --

MR. SLATER: Okay.

THE COURT: -- we've said multiple times you're not opting out of a (b)(2) class, period. End of paragraph, end of story, end of book. That's -- you're not doing that.

What you can opt out of is (b)(3), not (b)(2). So I don't think I have to keep saying that, but you keep -- you keep straying us -- straying us back to that alley.

MR. SLATER: I apologize, Your Honor. Let me phrase it this way, if I could.

THE COURT: Okay.

MR. SLATER: What would my rights be as an opt-out from the (b)(3) class with regard to the ability to get second, third, fourth, fifth, et cetera, additional Blue bids or request them?

THE COURT: All right. So the parties are negotiating this and talking about this.

Does anyone want to weigh in on that question?

MR. ZOTT: Your Honor, this is where -- I think I tried to answer it before, but it's -- I agree that, you know, this is not easy. This is Advanced Civil Procedure probably. So I think the answer is they could seek an additional Blue bid because that's divisible. I think they would be able to see more than one, two or three. I think there would come a point, as I said before, if you sought -- if the Court said you're entitled to seek 36 Blue bids, I think that essentially is the --

THE COURT: They could seek -- let me just cut to the chase.

MR. ZOTT: Okay.

THE COURT: They could seek a ruling from the Court that as it relates to their business, the Blues cannot agree not -- to restrict bids. Right?

MR. ZOTT: I think -- no, I don't think so. Because if the Court -- in essence, as to their individual business, the Blues could not enforce ESAs, they couldn't --

THE COURT: I didn't say they couldn't enforce ESAs.

MR. ZOTT: Okay. But they couldn't restrict bids, which is -- since service areas don't allow plans to compete with each through bids -- yeah.

THE COURT: All right. But the point is as it relates to this limited opportunity for this unique group to get a second bid, that is attacking the service areas, isn't it?

MR. ZOTT: But that's within the structure of the settlement. So the settlement already recognizes we're preserving service areas.

THE COURT: So then why would you be entitled to get a third Blue bid?

MR. ZOTT: Because I think that a third Blue bid would fairly be characterized as divisible, you know, injunctive relief.

THE COURT: So what number does it become indivisible?

MR. ZOTT: I think that's a line that would have to be drawn under the specific facts and circumstances of the case. I think you would get to the point when you're, in essence, eradicating ESAs. Even though you're not using those words, functionally, that's what you're doing. And I don't think --

THE COURT: But you're not eradicating ESAs. You would

be altering the way your -- whether your business is -- whether the Blues can agree on this one unique client not to compete with each other. Right?

MR. ZOTT: Right. But that client, even though he's bringing an individual case -- the vehicle doesn't matter. If he's bringing an individual or a class case, he is bound by the (b)(2) release. Individually -- it doesn't matter what kind of lawsuit it is.

THE COURT: But the (b)(2) release does not include a second bid; right? That's now become (b)(3) relief.

MR. ZOTT: That's right. Because that's legitimately individualized, and we agree with that.

THE COURT: The opportunity for a unique -- for a self-funded account or an ASO -- I don't know if those are synonymous or not. I'm still trying to figure that out.

MR. ZOTT: For today.

THE COURT: Yes. For purposes of this discussion, let's say they are.

MR. ZOTT: Yes.

THE COURT: There's an exception under the settlement for them to move beyond the exclusive service areas; right?

MR. ZOTT: Yes. They -- yes.

THE COURT: All right. So why would -- if they -- if that's -- and that now moves into -- for this unique class -- subclass of entities, that moves over to (b)(3). That's

indivisible. I mean -- excuse me. That's divisible.

MR. ZOTT: Correct.

THE COURT: Well, if it's divisible because it's unique to them, does it matter what the quantity is? Does it matter what the terms are that they're litigating over to say that they ought to be able to get this additional bid or bids?

MR. ZOTT: It -- yeah. It's divisible because it is not a challenge to a policy that would apply across the board to the entire class.

THE COURT: Right.

MR. ZOTT: So -- and so if they seek -- and a second Blue bid under the structure isn't given to everyone. It's only given to certain class members. That would make it divisible. It doesn't apply to the class as a whole. That's why it's divisible. But if their relief, even if not stated this in substance -- or in form, in substance, it's actually a challenge to service areas at large. Because they get ten bids or 15 bids, that is a challenge to a policy that they released their challenge to that policy.

And what I'm saying is I don't think today we have to decide where that line is drawn, because that should be drawn -- we can articulate the principles that would govern the settlement, but where exactly that line is drawn should wait until we have, you know, a concrete litigating case in the future. Ultimately, I think it's going back to Your Honor. But

all I'm saying is I don't think three Blue bids would basically be tantamount to a challenge to the policy itself, which they can't do --

THE COURT: Doesn't that come down to a decision by your clients about whether to challenge something or whether to let something slide?

MR. ZOTT: Well --

THE COURT: If it's three, we may let it slide. If it's four, we're going to take the position that they can't go to four.

MR. ZOTT: I think that's -- partly, that's right. It would be partly litigation strategy, facts and circumstances.

THE COURT: So how does he advise his clients about their rights to opt out of this, what their rights would be if they do opt out?

MR. ZOTT: I think we have to say that you're bound by the (b)(2) to the fullest extent of the law. You can bring under the (b)(3) claims for individualized relief, including damages and injunctive relief, provided they don't violate the (b)(2) release. Then, you know --

THE COURT: All right. Let's say I determine for purposes of this settlement that a second Blue bid is sufficient; putting aside employer -- putting aside size and geographic dispersion, that a second Blue bid is enough to put this outside the category of clearly illegal. All right?

That's one of the components that makes it not clearly illegal.

MR. ZOTT: Okay.

THE COURT: All right? And what the objectors are saying is not that we're entitled to a -- and I realize this is hypothetical. This is not what you're saying.

But objectors are saying second Blue bid is fine, but everybody ought to get a second Blue bid. You shouldn't draw the line on size and geographic dispersion.

Would it be divisible relief, then, to let them opt out and say you can pursue only a second bid, nothing else?

MR. ZOTT: It is --

THE COURT: You can go litigate your case about whether you're entitled to a second Blue bid?

MR. ZOTT: I think it is divisible relief for them to opt out and pursue a second Blue bid. I think they can opt out and challenge the criteria. I think if they opt out, they can say, you know --

THE COURT: Well, that would be essentially --

MR. ZOTT: Yeah. I mean, they're not bound by the --

THE COURT: -- litigating the second Blue bid. They'd be challenging the criteria.

MR. ZOTT: Right. They're not bound by the divisible relief. Right. Exactly. But they can't go so far as to violate the release they gave as a member of a nonopt-out (b)(2) that assuming Your Honor approves it, it binds every member of

that class.

THE COURT: And to some degree, we've got the next topic up. It's going to be the second Blue bid. So this may make more sense once we've hashed out some of the arguments in favor of the second Blue bid and some of the arguments against it.

MR. ZOTT: Sure. Okay, Judge. Very well.

Anything else?

MR. LAYTIN: Your Honor, could I say one more sentence on this point?

THE COURT: You may.

MR. LAYTIN: I just think --

THE COURT: You're always invited to say one more sentence.

MR. LAYTIN: Thank you, Your Honor.

THE COURT: I have a bet it's going to be more than one more sentence.

MR. ZOTT: That was one more sentence.

MR. LAYTIN: This discussion underscores why it depends on the facts and circumstances, because it is not just this one axis we've been talking about about individualized, but it is when the requested relief turns into a challenge that would undermine the service-area system. And that may not just be this pure legal question of divisibility. It may -- the determination of whether it runs afoul of the (b)(2) release may

actually depend on the facts and circumstances of the plaintiffs and their requests. And Justice Potter -- you know, Justice Stewart might actually be the fact-finder. That might actually have to be something that is determined in that collateral proceeding.

THE COURT: And my point is -- so a couple of things strike me. One, in a case of this magnitude, this is not an unexpected occurrence that we have a wrinkle that comes up that has to be revisited during the -- even during the hearing. So that's the first point I'd make.

The second point is I'm probably going to want some briefing on this beyond the hearing and give everybody a chance to collect their thoughts, particularly our friends on the objector side, who just heard this for the first time this morning, go back and talk to their expert and process it.

But the only thing I've tried to do very clearly with you is to say I'm happy to let you make your arguments about why you ought to be able to opt out. And you can tell I'm already in your camp there. I'm happy to let you make your arguments about what your opt-out rights ought to look like. What I'm not going to be happy about is if it turns out your opt-out rights are essentially the exception that swallows the rule, undermining the (b)(2) relief that I'm considering.

And I used my analogy about, you know, a suit filed during the course of the settlement, one, because there was a

suit filed during the course of the settlement, but also because it clarifies I think what the concern is. And that is regardless of whether we're applying the effect on judgment or the preservation of jurisdiction to consider the settlement, the whole point is we can't have people coming in and collaterally attacking a proposed settlement or a settlement. And that's my only distinction I've tried to draw with you at this point.

MR. SLATER: Understood, Your Honor.

THE COURT: Yes.

Mr. Boies --

MR. BOIES: Yes, Your Honor.

THE COURT: -- please bring clarity to this situation.

MR. BOIES: Well, I'm not sure it's possible.

THE COURT: All I'm asking you to do is to help us all understand.

MR. BOIES: Well, if I hadn't been a lawyer, I would have been a high school history teacher like my father. So let me talk a little bit about the history, because I think it may be illustrative here.

THE COURT: I think I would have liked to have taken one of your history classes if you would have --

MR. BOIES: It was great. He was a great teacher.

But the history here is that we started off in which the compromise was -- they were going to give us green competition; we were going to not attack the ESAs. And there

were a lot of reasons for that, a lot of good reasons, we think. And despite the fact that we weren't going to attack the ESAs, they were going to give us some second Blue bids. And we thought that was important, to be sure, to benefit the people who got the second Blue bids but, more important, because we thought that would have an ability to drive competition and innovation. It would benefit the entire market.

When we came to the point where we were convinced that people had to opt out, initially, we started out with a proposition that if you opted out, you ought to be able to get your second Blue bid like the people who stayed in. The thought -- and I'm not sure I personally agreed with this thought, but the consensus on both the Blues' side and the subscribers' side was that you couldn't limit it to just one Blue bid; that once you concluded that it was individualized, you had to permit people to have more than one -- or seek --

THE COURT: To litigate their claim.

MR. BOIES: -- to litigate their claim for more than one Blue bid.

But it's clear that moving from two Blue bids to multiple Blue bids was not going to be a way to sort of swallow the compromise that allowed the ESAs to remain in place.

Now, I can't stand here and tell you where that line is, and I think probably that line may depend on an individualized basis with respect to particular litigants. But

it is -- I think it's a lot closer to two Blue bids than it is 36 Blue bids.

THE COURT: So -- but what is the criteria? What's the test I should apply in defining what that is?

MR. BOIES: Now --

THE COURT: That's what I'm struggling with.

MR. BOIES: Now, again, going back to the history, we got to the second Blue bid in part because national accounts, large national accounts, operated in more than one ESA. And the idea was that they should be able to go to any ESA in which they had significant operations and get another Blue bid. And I still think that that is one way to cabin the number of Blue bids that people could get, by saying you may be able to get Blue bids from people -- from Blues in which you have significant operations, because that doesn't --

THE COURT: And that may actually make sense, because I'm not sure what the incentive for someone on the other side of the country is to come in and offer your business a deal --

MR. BOIES: Right.

THE COURT: -- if they're not servicing in that area to begin with --

MR. BOIES: Right.

THE COURT: -- and have no interest in doing it.

MR. BOIES: I think that's right.

THE COURT: And you can always go get a bid from a

green business if that's what you're looking for.

MR. BOIES: You could always get a bid from a green business, no matter where they're located.

But I'm sympathetic to the objectors' view that says we ought to define and cabin what the extent of the second -- multiple Blue bids or additional Blue bids are. I think we can't have it be that you can get 36. That just swallows the compromise. So I think that --

THE COURT: Let me ask counsel for the objectors this question. If your -- if there had been no line drawn of where the second Blue bid was, would your client be unhappy with the deal, with that aspect of it?

MR. SLATER: I'd actually have to ask the clients. Since that wasn't the condition they were looking at, I don't have that --

THE COURT: That's a fair response.

MR. SLATER: I can say this. We've spoken with the economists, and one of the theories that we've been looking at is an auction bid theory and how many bids do you need for the competitive environment to maximize the price.

THE COURT: Well, so -- yes. That makes sense.

MR. SLATER: But --

THE COURT: But I'm going back to this. We keep talking about this in the context of X number of bids, I'm entitled to X number of bids. Alaska Air isn't going to -- if

they were to be free from any of this, if the Blues had no ESAs, if there was no agreement in place that we're having to navigate through about a second Blue bid and Alaska Air said, you know what, we'd like to buy health insurance from a Blue, you wouldn't get 36 bids. Not all 36 Blues would want your business. I think your economists would tell you that; right?

MR. SLATER: Our plan -- again, I'd have to ask that question, but --

THE COURT: I'd be concerned about an economist that told you differently.

MR. SLATER: Well, if you have Federal Express with 500,000 employees, as we do --

THE COURT: Now we're talking turkey. But they haven't objected; right?

MR. SLATER: No.

THE COURT: I'm just kidding. I was trying to set you up there.

MR. SLATER: They --

THE COURT: So they want -- they clearly qualify for a second Blue bid; right?

MR. SLATER: No, they don't.

THE COURT: They don't?

MR. SLATER: No, they do not. They lose that right --

THE COURT: Okay. Because of geographic dispersion?

MR. SLATER: No. They lose that right because they've

opted out of the (b)(3) class. I have eight clients --

THE COURT: No. I'm talking about if they didn't opt out, if they didn't object, would Federal Express -- where would they be on that list?

MR. BOIES: Federal Express I believe would qualify.

THE COURT: They would qualify for a second Blue bid.

MR. SLATER: If they hadn't opted out of the (b)(3) class.

THE COURT: Yes. No, I'm saying they would have qualified for a second Blue bid.

MR. SLATER: Yeah. If --

THE COURT: Would have. So -- but their argument is we want more than two bids.

MR. SLATER: Well, no. Their argument is they want to opt out of the (b)(3) class and pursue their monetary relief, as they are constitutionally allowed to do, without losing the right to seek a second bid.

THE COURT: But they've also -- yes. But the point is they wanted more than two Blue bids or else they would have just opted out of the monetary relief class, stayed in the (b)(2) class, and never raised an objection to any of the (b)(2) relief.

MR. SLATER: Correct.

THE COURT: All right. So let's be linear here in our communication. I guess my point is this. So the answer is you

do have some clients who were unhappy with just two Blue bids.

MR. SLATER: Yes.

THE COURT: So but what if I were to determine -- and this is hypothetical -- that two Blue bids is enough to create competition in the market because -- especially when you put it with the green business? I guess that's what we're getting at here is to what extent are you going to be able to go back and assail the entire structure of the settlement. And Federal Express is probably a good example of someone who may be tempted to do just that; right?

MR. SLATER: Tempted to do just what?

THE COURT: To attack the entire (b)(2) structure --

MR. SLATER: Your Honor, I truly don't know. I've never had that discussion with Federal Express or any of the other clients. That was never an option, and I never heard that that could possibly be on the table until this morning.

THE COURT: Okay. Fair.

MR. SLATER: So it would be unfair to the client for me to, you know, opine on it here.

THE COURT: All right. Let me ask you this before we move on to the next topic. Because I think we've kind of reached an impasse here and I think we've got to do some more -- I've got to have some more information.

Do you agree with the way that both sides have articulated the legal standard? And that is that the question

here is whether the structure going forward is clearly illegal; and if it is not illegal to a legal certainty or unless the illegality of an arrangement under consideration is a legal certainty, the mere fact that certain of its features may be perpetuated would not bar approval.

MR. SLATER: Your Honor, I think the test is whether the conduct that goes forward is illegal as a matter of law. In this case, the way that trans- --

THE COURT: Is that synonymous to a per se violation?

MR. SLATER: Yes, sir. And I think the parties have agreed here today and I think at the preliminary approval hearing that if the horizontal territorial allocation remains per se illegal after the national-best-efforts rule is eliminated, that if it's per se illegal as a stand-alone offense, that then the settlement could not be approved.

THE COURT: All right. And then the follow-up question to that would be you've heard *Topco* and *Sealy* distinguished.

MR. SLATER: Yes, sir.

THE COURT: I take it you don't agree with those arguments?

MR. SLATER: No, I do not.

THE COURT: Okay.

MR. SLATER: Well, to be perfectly fair to the defendants and fair to Your Honor, *Sealy* clearly talks about an aggregation --

THE COURT: Right.

MR. SLATER: -- of offenses. And --

THE COURT: So you're hanging your hat on *Topco*, I would think.

MR. SLATER: Yes. And at the summary judgment point, Your Honor pointed to that, understandably, and said, I have *Sealy*, and here in this case, I have an aggregation, a national-best-efforts rule, along with the horizontal territorial allocation. I don't need to go further than saying *Sealy* --

THE COURT: And we had local best efforts and a couple other ornaments on the tree.

MR. SLATER: Correct. So now the question, I believe, is something that Your Honor did not confront at the summary judgment stage, whether the territorial allocation is per se illegal in the absence of any aggregated second offense.

And I think the answer to that question can clearly be found in *Topco*. In *Topco*, the defendants agreed that no one of them would be able to invade the other's territory using *Topco*-brand marks. There was no prohibition on what we've called here a green competition. Any one of the defendants in *Topco* could have invaded the territory of his coconspirators with an XYZ brand. Nothing prohibited it. Yet the Supreme Court said -- and this goes to the trademark piece as well. The Supreme Court said the use of the trademark in that way to

exclude competition against each other using that mark is a per se violation of the Sherman Act.

And the Court even addressed specifically the aggregation issue that had come up in *Sealy*. And they said *Sealy* is just like *Topco*, meaning that there would be no aggregation if it were just alike. And at the point where the Supreme Court said that, it then left a footnote. And the defendants, in their papers, have never responded to this footnote. And I think it totally disposes of the question of whether you need aggregation under *Sealy* in order to have a per se violation. Footnote nine appears at 405 U.S. 609. It is true that in *Sealy*, the court dealt with price-fixing as well as territorial restrictions.

Here, Your Honor, you've dealt with the national-best-efforts rule, which is a horizontal output restriction, which is a form of price-fixing.

And the Supreme Court goes on: To the extent that *Sealy* casts doubt on whether horizontal territorial limitations unaccompanied by price-fixing are per se violations of the Sherman Act, we remove that doubt today.

That puts to rest the question of whether aggregation is required and answers the question Your Honor did not have to answer when you decided the summary judgment decision.

Now, the defendants have two additional explanations for why this conduct should not be per se illegal. One is the

single-entity defense, which revolves around, of course, *American Needle*. Your Honor, the defendants claim that the single-entity defense protects them because what they are accused of is managing the Blue Cross Blue Shield trademarks and that for purposes of managing the Blue Cross Blue Shield marks, they can be considered a single entity.

Your Honor, under *American Needle*, the criteria laid out by the Supreme Court is pretty clear. The criteria is whether the agreement joins together separate decision-makers and whether the agreement is, quote, among separate economic actors such that the agreement deprives the marketplace of independent centers of decision-making and, thus, actual or potential competition.

Now, *American Needle* then goes on and announces a functional test, and the functional test asks whether this criteria has been met with regard to the alleged unlawful conduct. That's the test laid out in *American Needle*, whether the criteria that I've laid out satisfies the functional test asking whether the conduct is -- asking whether the conduct that has been alleged to be unlawful could be the conduct of a single entity. That appears at 560 U.S. 191, also 560 U.S. 198. The Supreme Court discusses that functional application in both places.

Professor Hovenkamp, who was cited 11 times in the *American Needle* decision, has interpreted the *American Needle*

case to be that the proper analysis under *American Needle* is to focus on the particular practice under antitrust scrutiny; in other words, the same thing I said before, focus with a functional test on the alleged unlawful conduct.

The Department of Justice, in a case that was argued in the Eleventh Circuit on September 20th, a case called *Arrington versus Burger King* -- in *Arrington versus Burger King*, Burger King claimed that it was a single entity along with its franchisees because they all use the Burger King trademark. Or that was one of the bases for the single-entity objection.

The Department of Justice Antitrust Division weighed in with an amicus brief. And in the amicus brief, which we'd be happy to make available to the Court, the DOJ said that the proper analysis under *American Needle* is to evaluate functionally whether the defendants had disparate economic interests with respect to the challenged restraint.

So what is the challenged restraint here? The challenged restraint is that each of the Blues, an actual or potential competitor with the other Blues, agreed that none of them would enter each other's territory and compete with the Blue marks. Each of these entities is a separate corporation with its own profits and losses and its own sales and its own incentives to make money. Each of them is separate for the purposes of determining whether they will invade a competitor's territory and compete against that competitor to take away sales

from them. I don't think there's any way that that challenged restraint could satisfy the functional test laid out in *American Needle* that it is the challenged restraint which must be justified as the conduct of a single entity.

Now, in order to avoid the result that the conduct is per se because the single-entity defense is unavailable -- in order to justify that, the defendants, with all due respect, Your Honor, misstate the rule -- misstate the test. They say that the test is whether the conduct is that of a single entity for purposes of managing the Blue Shield Blue Cross trademarks. Your Honor, nobody is alleging that management of the mark is illegal. The specific thing which is alleged to be illegal is the agreement not to invade each other's territories. Potentially, they could be a single entity with regard to managing the overall quality of the mark, but --

THE COURT: What do you say to the argument that they can invade each other's territories, they just have to leave -- unlike American Express, you just have to leave the mark at home?

MR. SLATER: You have to what?

THE COURT: Leave the mark at home.

MR. SLATER: The green competition.

THE COURT: You know, don't leave home without it. You've seen that commercial.

MR. SLATER: The green competition. The answer to that

is what Your Honor touched on earlier today. It's *Topco*. *Topco* says that's per se illegal. What you're -- and the argument that this is just a trademark and you can invade the green competition, that was true in *Topco*, and the Supreme Court held that it was per se illegal. Now, I understand Your Honor's comments that *Topco* has been criticized.

THE COURT: No. If you go back to my preliminary approval order --

MR. SLATER: No. I --

THE COURT: -- I was quite clear that the Supreme Court has told me and many people like me, it's for us to decide whether our precedent is no longer valid, not for you.

MR. SLATER: Your Honor and I are on the same page.

THE COURT: The question is whether it's distinguishable, not that it's invalid.

MR. SLATER: Yeah. I don't think it's distinguishable. In *Topco*, you had the possibility of green competition amongst each of the defendants, but the Supreme Court still said it was per se illegal and that the linchpin of using the mark and saying you can't compete against each other in each other's territory by using the mark is per se illegal.

And, you know, the old saying you can't get there from here, the defendants can't get there from here. *Topco* controls. It says this is per se illegal. Once you dispose of the single-entity defense, you're left with nothing more than *Topco*.

And this is true with regard to the common-law trademark arguments that they make as well. According to the defendants, the fact that there were 36 entities -- actually, it would have been more because there were predecessors and mergers -- but 36 entities that had common-law trademark rights where each of those individually owned trademark rights went to one particular Blue who could choose to exercise that mark how he wanted -- he might get sued by another Blue, but that would be fought out in a litigation between them. But each of the separate Blues who owned those marks could go and compete with them where they wanted.

The defendants then say that all of the Blues got together and they hypothesized that they all transferred their individual independent trademark rights to one entity, Blue Cross Blue Shield Association, controlled by a 75 percent vote of all of them. And they say that somehow this distinguishes themselves from *Topco*. No, it doesn't.

Their defense argument is not a defense; it's a confession. They are admitting that what their entire argument is based on is the proposition that *American Needle* is wrong. Their entire argument is that under *American Needle*, we can take 36 independent entities, put all of the rights into one Blue Cross Blue Shield Association, and that association, as a group, can then make group decisions as to how and where each one of these independent entities can compete. No, they can't. That's

exactly what *American Needle* prohibits. Once you've gotten through the analysis of their arguments on common-law trademarks --

THE COURT: Let me ask you this.

MR. SLATER: Yes, sir.

THE COURT: Have you looked at the Rule 56 record in this case?

MR. SLATER: Yes, I have.

THE COURT: Do you think I missed the mark, then, on saying that was an issue for the trier of fact? That's a legit -- I'm an adult. I can take it.

MR. SLATER: Yes.

THE COURT: Okay.

MR. SLATER: Yeah. I --

THE COURT: But that's what you'd have --

MR. SLATER: The argument --

THE COURT: The argument here isn't whether or not *American Needle* actually wins the day for you or the Blues or, more appropriately, the subscribers or the Blues in this case. The question is whether -- how is that issue going to come out based upon a ruling of the trier of fact. Because whether I'm right, wrong, or somewhere in between, that's what the parties dealt with when they sat down at the negotiating table after the standard-of-review order and the orders that followed it in that I said the Court cannot decide this question as a matter of law,

we're going to have to litigate this issue further. And so to litigate this issue further, the parties had a decision to make: Should we litigate or should we settle? And that was the landscape they settled under; right?

MR. SLATER: I wasn't privy to the settlement negotiations, but I believe so.

THE COURT: No. I mean that's -- the settlement -- I can represent to you -- I'm pretty certain I'm right on this -- the settlement negotiations bore fruit and ended up in the settlement that's before the Court after I said --

MR. SLATER: Yeah.

THE COURT: -- there's an issue under *American Needle* that has to be decided by the trier of fact. There's conflicting evidence in the Rule 56 record. I can't make that decision as a matter of law.

MR. SLATER: I believe you can. I'm arguing to persuade Your Honor today that that was incorrect. You can make the decision as a matter of law. None of the facts which I have related --

THE COURT: Well, how does that assail the parties' position on the settlement? You're telling me that I missed the mark and I gave the parties incomplete information, perhaps. But does that really go to the adequacy, reasonableness, and fairness of the settlement if the parties are stuck with a ruling that, to some degree, the Eleventh Circuit could have, if

it decided to, taken up interlocutory? They -- we punted the standard. I worked just as hard on the 1292(b) order as I did the standard-of-review order because, believe me, I would have liked nothing more than two or three judges in Atlanta to tell me whether I was right or wrong. Because we were at a fork in the road and the parties were at a fork in the road, and they had to make a decision about whether they were going to litigate for other decade or resolve the case.

MR. SLATER: Yeah. And what I'm saying, Your Honor, is that as a matter of law, without getting into any disputed fact, that the analysis that I have made of *American Needle* is not predicated on any legitimate disputed fact. We know we have 36 independent companies. We know they have their own profit-and-losses. The hypothesis is that they all got together and --

THE COURT: But you understand my question. My question is --

MR. SLATER: I do. And I guess --

THE COURT: I'm accepting as true everything you're telling me --

MR. SLATER: Your Honor --

THE COURT: -- that you believe that, that that would be -- let's say it's a valid argument. Let's say you're right. You're armchair-quarterbacking me in that situation, not the parties.

MR. SLATER: I'd phrase it a little differently, Your Honor, and more in my own favor. What I would say is that I'm arguing that the violation, the horizontal territorial allocation, is per se illegal wherever it is in the litigation that Your Honor decides that. And that per se rule precludes a settlement which orders people, against their will, to release the claims against those per se violations for five years going forward. I think we're all agreed that if the conduct is per se illegal, there cannot be release going forward. And certainly it shouldn't be released in a nonopt-out (b)(2) class where objectors are saying, I don't want to release that claim, you shouldn't make me do it, it's per se illegal. And I think that is the condition that we're facing today.

And the defendants made three arguments on why *Topco* does not mean their behavior is per se illegal. One is aggregation. I submit that that's eliminated by footnote nine to *Topco*. Two is the single-entity defense. I submit that that's rendered nugatory by the fact that if you properly apply the test and ask whether they can justify the allegedly unlawful conduct as being that of a single entity, that that answers the dispute and says no, that's not joint behavior that's -- or that's not a single-entity behavior, that's joint behavior and, therefore, fits right into what? *Topco*.

Once the *American Needle* single-entity defense is gone, as I believe it is without any disputed facts, then you're left

with nothing but *Topco*. An agreement among these people not to compete against each other in their respective territories using the mark unrelated to aggregation or any other offense is per se illegal, so saith the Supreme Court. Whether they were right or wrong is beyond, you know, my pay grade. And Your Honor has weighed in and said it's not for you to decide that either. So once you're at that point, I think you have to -- I think everybody has to concede this conduct is per se illegal. And if you --

THE COURT: And yet they're not.

MR. SLATER: Excuse me?

THE COURT: And yet they're not.

MR. SLATER: Your Honor, I don't want to waste more time by going through that.

THE COURT: No, I appreciate the argument. You've cut right to the quick on some things. You danced around a couple others, but I really do appreciate you cutting right to the quick on a couple things.

MR. SLATER: Let me touch on a few other items.

The Supreme Court in *Wal-Mart versus Dukes* very clearly held that conduct cannot be included in a (b)(2) release if it is individualized or divisible. The conduct here that they want released, whether they're letting me get one second Blue bid in the (b)(3) class or not is divisible and is individualized. And as I said when I first stood up, it's divisible because some

people get it and some people don't. For example, you know, take Federal Express, as we mentioned a minute ago. They would have gotten the second Blue bid but for the fact that they individually decided to opt out of the (b)(3) class, so it was taken away. That's clearly individualized relief and it's clearly divisible relief.

THE COURT: Now, it does strike me that in *Wal-Mart versus Dukes*, the question was whether -- they're assessing what I think was an incorrect -- incorrectly decided line of cases that said that monetary relief under certain circumstances could be certified under (b)(2). And it was no surprise to me at all when the Supreme Court straightened that out.

MR. SLATER: Yeah.

THE COURT: Of course, they amended cert and then reached out and took on the (a)(2), (a)(3) question.

MR. SLATER: Yeah. And what they --

THE COURT: But the (b)(2), (b)(3) question was clear cut in *Wal-Mart versus Dukes*, I thought, but it doesn't deal with divisible injunctive relief. It was just damages. Judge Breyer, in the Northern District of California, had certified this class under (b)(2). He relied upon a lot of Ninth Circuit authority to do that, the Ninth Circuit had affirmed him, and the Supreme Court set us all straight.

MR. SLATER: And what the Supreme Court said is this. And the language is pretty clear. I understand the factual

distinction Your Honor is pointing to, but the language is pretty clear. Claims for individual relief do not satisfy the rule. The key to the (b)(2) class is, quote, the indivisible nature of the injunctive or declaratory remedy warranted, the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.

In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class -- and plainly, not each member gets a Blue bid -- to each member of the class. It does not authorize certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant.

That's precisely what the settlement in this case does. It gives each of the class members a different relief. And in the case of my clients, it's different in that they don't get --

THE COURT: Well, technically yes; technically no. Right? I mean, it really divides the world into two parts, those who get a second Blue bid and those who do not.

MR. SLATER: For various and different reasons, yes.

THE COURT: Professor Gentle took over my Complex Civil Litigation class at Cumberland. Maybe he's going to put something like this on his next final.

SPECIAL MASTER GENTLE: Absolutely.

MR. SLATER: I've taught law school for a while, Your Honor. I'm not sure I would do this to any law student.

THE COURT: Oh, I was known to do worse than this. I used to tell them I would rather be held down and physically beaten with an aluminum bat than take my exam.

MR. SLATER: Your Honor, let me get to the third of four points. And this -- you know, I've expressed my reservations with regard to the fix expressed or dealt with this morning. But short of, you know, my reservations on that, what we have is a class where there is an agreement to punish certain class members for exercising their constitutional right to opt out of the damages class.

Mr. Boies tried to explain the derivation of this and why it's there, but I didn't hear a rationale or justification for why somebody who opts out of the (b)(3) class would be punished by losing his (b)(2) relief, a class from which he cannot opt out of.

Your Honor, we've mentioned FedEx. I would be remiss, I think, if I didn't mention my other clients who would have received a second Blue bid but for the fact that they opted out of the (b)(3) class. That includes Albertson's, which I believe is the third largest supermarket chain in America.

THE COURT: And my second employer ever.

MR. SLATER: I hope they treated you well.

THE COURT: They did.

MR. SLATER: Boeing, Bridgestone Tire, Conagra, Dollar General, FedEx, Tractor Supply, and United Natural Foods, which is a name change of SuperValu, the supermarket chain out of Minneapolis.

Your Honor, it was very difficult to explain to the general counsel of these people why their firms were being denied a second Blue bid. You know, they were -- these are enormous companies. You know, Boeing and FedEx alone have over 800,000 employees. And they're saying people should want my business, and these guys are agreeing they won't give me even a second Blue bid because I didn't like the monetary relief that was allocated to me.

You know, Mr. Lowrey for Home Depot has a few words to say after I sit down. But, you know, it's very difficult to explain to people like this why is it that they're being discriminated against and punished for exercising what we told them -- I told them -- was a constitutional right. And I didn't make that up.

THE COURT: But, in all fairness, I think the Court's proposal resolves all that. Now, what we're quibbling about now is exactly what relief they can pursue after they've opted out, but there's no burden on the constitutional right to opt out or the procedural right to opt out of Rule 23, so --

MR. SLATER: Fair point, Your Honor. Yeah.

THE COURT: But that is a good drum beat. It's just

an --

MR. SLATER: Thank you.

THE COURT: It's an old drum beat.

MR. SLATER: Well, as long as I'm beating a drum, let me comment on one thing that's been particularly troublesome, and that's the way that this was handled. At the preliminary approval stage, the agreement that was presented to Your Honor and the long-form notice that was attached to that agreement provided that if you opted out of the (b)(3) class, you lost any right to a second Blue bid, period, full stop.

We sent a letter to subclass counsel complaining that this was unconstitutional. After we sent that letter, the long-form notice was changed. Nobody came before Your Honor and sought approval of that change. They just changed it. And they sent out a notice that was actually -- it looks to have been attached to the wrong paragraph. But the notice says that you can opt out of the injunctive relief, but all you can get in a courtroom when you file your claim would be the second Blue bid if you would otherwise qualify for all the criteria, including dispersion, for a second Blue bid. And then you would still have to release your claims for all other relief from the horizontal territorial allocation. And it is that provision that was put in there without Your Honor's --

THE COURT: Well, but, again, aren't we -- hasn't the Court addressed all that?

MR. SLATER: I'll move on.

THE COURT: Okay. Thank you.

MR. SLATER: My last point, Your Honor, when this -- we mentioned this earlier, whether Your Honor has authority to grant opt-out rights to a (b)(2) class. The defendants have argued that you do not, that (b)(2) does not allow for opt-outs.

THE COURT: Is there a material distinction between the Court exercising its discretion to allow people to opt out of (b)(2), as you've contended the Court has discretion to do, and the Court simply migrating whatever opt-out rights and class over to (b)(3) and saying you can opt out of that? Is there any real distinction between those two?

MR. SLATER: Only the distinctions that you and I discussed some time ago today with regard to what rights opting out of a (b)(3) class that now includes the second-Blue-bid relief would grant to my clients.

THE COURT: Yes. So to be honest with you, the reason I think (b)(3) makes more sense than (b)(2) is it's cleaner. It's clearly individualized relief, as you've articulated, or divisible relief, as I've articulated.

MR. SLATER: Yes.

THE COURT: I think those are synonymous for purposes of our discussion. And we don't have to litigate -- that means nobody has to litigate in the Eleventh Circuit whether or not I had the right to let somebody out of a (b)(2) class. I'm

letting them opt out of a (b)(3) class, and there's plenty of case law that permits that.

MR. SLATER: Well, I believe the case law requires that you be able to opt out of a (b)(3). *Wal-Mart* --

THE COURT: Right. I'm just saying it's cleaner.

MR. SLATER: Your Honor, I've used up a lot of the Court's time. Thank you very much.

THE COURT: No, you've done well with the time. I appreciate it very much.

MR. SLATER: And I believe Mr. Lowrey for Home Depot --

THE COURT: I'll be glad to hear from Mr. Lowrey.

MR. SLATER: -- has made much of the same arguments that we have.

THE COURT: But he's signaling time-out.

MR. LOWREY: I'm just going to be a lot more comfortable making this argument if we take a short break, Your Honor.

THE COURT: I understand. We call that a quiet sidebar.

MR. LOWREY: You have correctly discerned my --

THE COURT: Yes. Why don't we all take a break so we'll be more comfortable hearing your argument.

MR. LOWREY: No guarantees on that, Your Honor.

MR. SLATER: Thank you, Your Honor.

THE COURT: Thank you. Appreciate you.

(Recess at 3:45 p.m. until 4:05 p.m.)

THE COURT: All right. Everybody ready?

MR. LOWREY: Yes, sir.

THE COURT: I think we've reached an agreement that we're going to put on witnesses tomorrow; correct?

MR. BURNS: Yes, Your Honor.

THE COURT: And just to avoid -- to protect the public from me and to protect the witnesses from my dilatory tactics, I think we ought to do that -- plan on doing it first thing. Fair?

MR. BURNS: Thank you, Your Honor.

THE COURT: Because if I start asking questions, getting involved, next thing you know it's three o'clock and we haven't put the witnesses on yet. Okay.

MR. LOWREY: Thank you for the break, Your Honor. I appreciate that.

THE COURT: Thank you for being here today.

MR. LOWREY: Also the welcome chance to take off the mask.

Miss Risa, I am not going to talk fast.

THE COURT: That may be the sole reason you really wanted to speak; right?

MR. LOWREY: It may be. It's good enough, certainly.

I have my instructions: No fast talking on Wednesday afternoons, so I'm not going to do that.

THE COURT: That's for her benefit more than mine.

MR. LOWREY: It is.

THE COURT: Because I also talk too fast sometimes.

MR. LOWREY: She mentioned that, Your Honor.

THE COURT: I'm sure she did.

MR. LOWREY: That's not true. I made that up.

THE COURT: She would have if you had asked her.

MR. LOWREY: So good late afternoon. It's Frank Lowrey representing the Home Depot, only the Home Depot. Anything I ask you about today is something that I want to do for the Home Depot and no one else. We are self-insured. We are an ASO. If there's a difference between those things, I don't know it. But I do know --

THE COURT: I was just being careful earlier.

MR. LOWREY: I do know that we employ somewhere over 400,000 insured lives. We have opted out of the (b)(3) damages class. As you probably know, we have endeavored to opt out of the (b)(2) class; but I've heard you on that, and I'm not going to spend time talking about that.

THE COURT: So can I ask one question?

MR. LOWREY: Yes, Your Honor.

THE COURT: And I'm treating you as the reasonably prudent person from corporate America. Before Mr. Hausfeld and Mr. Boies showed up on the scene, where were y'all? Why hasn't big corporate America ever challenged the Blues on these things?

MR. LOWREY: You know, I can't speak for large corporate America, and I've never -- you know, if you're asking me a factual question, I've never had a discussion with my client about what sort of decision-making they have or haven't done on that.

THE COURT: But your counsel has appeared here saying this is so clearly per se --

MR. LOWREY: Well --

THE COURT: -- that it's hang on the rim, slam dunk; in fact, we probably shattered the glass. And yet for none -- Federal Trade Commission, Department of Justice, Home Depot, Federal Express, anyone -- ever brought these claims before any other court before; right?

MR. LOWREY: As far as I know. Well --

THE COURT: So what do I make of that?

MR. LOWREY: Well, I don't -- I don't think anything with respect to the points I want to make to you. I don't think that it relates. And we mostly just want to be out and be able to reserve our rights to assert our claims in the future as may seem right to us for a variety of business reasons that things like that do.

And so -- and maybe I should start with this. You know, we come here with great respect. We come here with great respect for the lawyers, for the Court, for the parties, for the work that all of you have put into this settlement. Truth be

told, I'd like not to be here at all, but I am here and I am in the (b)(2) class. And I want to talk to you about three aspects of it that are important to my client, and I think I can be useful to the Court on those topics as well.

And the first one I wanted to talk about was what sort of ruling you should or should not make, can or cannot make, regarding whether the going-forward structure is per se illegal.

And so I may need a little bit of assistance, because I want to use this document camera here, and I think somebody probably needs to turn it on.

THE COURT: Well, that's certainly not in my category.

MR. LOWREY: I wasn't instructing the Court to do it, certainly. I just knew I wasn't able to do it.

Before we talk even about Article III, there's some very clear Rule 23 law that instructs courts that you weigh the likelihood of success and failure and all of the *Behring* factors that we've talked about, but you do not decide the merits of the case and you do not resolve unsettled legal questions.

Former Fifth made that same point. It cannot be overemphasized -- now, I wouldn't let my associates write that way. I would strike that out if I was editing a brief. But the Fifth Circuit says, it can't be overemphasized that neither the trial court, in approving the settlement, nor this court, in reviewing that approval, have the right or duty to reach any ultimate conclusions on the issues of fact and law which

underlie the merits of the dispute.

It doesn't just say you don't decide the whole case. It says you don't decide the issues of law and fact that underlie the dispute.

So let's skip *Dixie Electric* for a minute and talk about *Bennett versus Behring*. What do we make of this language here that you have quoted to us? And quite rightly so. In *Bennett versus Behring*, the Eleventh Circuit instructs -- because the argument was the settlement didn't go far enough; right? And Eleventh Circuit's reaction is unless the illegality of an arrangement under consideration is a legal certainty, the mere fact that certain of its features may be perpetuated is no bar to approval.

So how do you put that law together? What does it mean? And I took what I think is kind of a Michael Scott approach to this. This is what I think you can say consistent with the case law: I have not decided and I am not certain that the conduct that would continue is per se unlawful. And I gave that one a red check because that's perfectly consistent with all of the authorities that I just read to you. This is what I believe the case law prohibits you from saying: I have decided that the conduct that would continue is not per se unlawful.

Now, those are two different things. In the first instance, you were saying, look, this is a complicated issue and I haven't decided it. Just because it's an issue of law that

would ultimately have one answer, per se or not per se, doesn't mean it's clear. It doesn't mean it's certain. I haven't decided it in this case. This settlement obviates my need to decide it. Now, if I had decided that it was per se illegal, I might have a different case on my hands, but that is within the ambit of what Rule 23 allows.

THE COURT: So pick that piece of paper up and go back to your previous piece of paper.

MR. LOWREY: Yes, sir. I already lost it. There we go. Which one?

THE COURT: Very bottom. *Bennett*. If the illegality of an arrangement is legally certain --

MR. LOWREY: Yes, sir.

THE COURT: -- I can't approve the settlement.

MR. LOWREY: If you are legally certain -- if you are legally certain that the going-forward conduct is per se illegal, then you can't approve the settlement.

THE COURT: And do you -- I can't remember what you said a moment ago, and I apologize for that. But do you think that's synonymous with if the settlement structure presents what would be a per se violation, I can't approve the settlement?

MR. LOWREY: If you are certain, if you have decided to a legal certainty that this is a per se issue and not a rule-of-reason issue, I don't think you could approve it; but more to the point, it's clear that you're not going to.

THE COURT: Right.

MR. LOWREY: So that's essentially academic.

THE COURT: That goes without saying.

MR. LOWREY: Sure. So -- but what --

THE COURT: Okay. But your point is nothing the Court should do in the -- if I, in fact, approve the settlement --

MR. LOWREY: Yes, sir.

THE COURT: -- and I guess to some degree if I don't approve the settlement -- I'm not making a legal ruling on whether it's per se or not. I'm just saying that if it appears to me to be per se, I can't approve the settlement. But beyond that -- and I don't know the difference between legal certainty and "appears to me." I mean, if something is legally certain, it's certainly going to appear to me to be so.

Let me ask you this, though. If it seems to be per se, I shouldn't approve the settlement, should I?

MR. LOWREY: As a matter of power or as a matter of discretion?

THE COURT: Either.

MR. LOWREY: I don't presume to question the Court, of course, but my concern is more with the limits of your power and what findings you can make in the settlement context.

THE COURT: And you're singing out of my songbook here, because I am very much federalism driven.

MR. LOWREY: I have read your stuff.

THE COURT: I think too many -- to be honest, too many of my colleagues in the past, shall we say -- we won't even count the ones in the present -- but in the past have misunderstood their role in our limited branch of government.

So you're right. I don't want to do anything that would be beyond my authority. But I do have a responsibility to make sure that the arrangement under consideration is not illegal.

MR. LOWREY: I respectfully don't agree. What I think you need to do is weigh the *Bennett versus Behring* factors. And so, for example, you might say were this litigation to proceed, the plaintiffs might persuade me -- and ultimately, a trier of fact on this single-entity issue -- that this is a per se illegal agreement. And that's --

THE COURT: I thought that's what I just said. So you picked --

MR. LOWREY: No.

THE COURT: You said you did not agree with what I just said?

MR. LOWREY: I did not agree with what you just said.

THE COURT: I just basically read you *Bennett versus Behring*, I thought. I've got to make certain that the arrangement under consideration is not illegal.

MR. LOWREY: No, Your Honor. Respectfully, you're transposing the language. As long as you are not legally

certain that it is illegal. It's the difference between these two things. One, the *Bennett* --

THE COURT: No, I don't think it is. I think it's somewhere in between. I think it's --

MR. LOWREY: I --

THE COURT: -- maybe 1.5. And I'm not sure that your one and two are necessarily capturing the correct legal standard that I apply here. I wonder if the standard isn't actually between those two.

Pull that up again.

MR. LOWREY: Which one do you want?

THE COURT: The pink one. Yes.

Okay. Unless the illegality of an arrangement under consideration is a legal certainty -- now, the Eleventh Circuit has said that different ways and at different times. Refer back to the Blues' presentation earlier: Although the Court must conclude that the going-forward system is not clearly illegal, it need not resolve the ultimate merits of the legal claims.

That's your point.

MR. LOWREY: Right. You cannot decide -- and I'm always cautious when I tell a court it can't do something, and it's obviously not me saying you can't.

THE COURT: Yes. You're an advocate. I'm not taking it personally.

MR. LOWREY: Fair enough, Your Honor.

That is right. I am telling you that in the context of settlement approval, you can't decide a legal issue of that sort.

THE COURT: I think the point is I can't try the legal issue. I can't decide on the merits of the legal issue, but I have some obligation before I approve this settlement to make sure that the settlement doesn't authorize a continuation of clearly illegal conduct.

MR. LOWREY: I -- if you have decided that the conduct is clearly illegal, if you have decided that, you're in one position. My point is if you have not decided that, unless you are certain that it is illegal, that's not an issue you resolve in the context of settlement.

THE COURT: By the way, I think the proponents of the settlement are glad you're saying these things.

MR. LOWREY: Well, they may be. But this is my worry. So you might say, Frank, why do you care about this?

THE COURT: Yes.

MR. LOWREY: Well, my concern is that --

THE COURT: I figured you were getting there.

MR. LOWREY: My concern is that I have opted out of the (b)(3) damages class. What the Blues would like for you -- and I always hesitate to speak for, you know, another party; but in my belief, what the Blues would like you to do is make a legal ruling that they will claim has resolved the standard that's

going to apply to my future damages lawsuit, should I ever bring one.

THE COURT: No. I don't think that's their argument. I think their argument is you're free to go try to convince Judge Manasco, Judge XYZ, Judge Proctor in your unique case, uniquely filed case on your own behalf, that the arrangement that you're challenging -- and that would be the presettlement arrangement -- let me -- let me --

MR. LOWREY: Certainly, Your Honor. Go ahead.

THE COURT: I'm going to get to where you want me to be. So when you go in for a damages class, the damages are based upon your case as it existed during the period of the statute of limitations; right?

MR. LOWREY: So if I were to file suit --

THE COURT: Are you in the Alaska Air case?

MR. LOWREY: I'm not.

THE COURT: Okay.

MR. LOWREY: No, Your Honor. I don't have a lawsuit.

THE COURT: Let's say you were. Let's say you were.

MR. LOWREY: Okay.

THE COURT: Your argument there is the aggregation of output restrictions, including ESAs and national best efforts in the past, is a violation of the Sherman Act. You would also argue, though, that going forward, as applied to us, the settlement violates our rights. In either event, your money

damages is going to be based upon what the conduct was basically presettlement because there's not a settlement right now if you were in the Alaska Air case.

MR. LOWREY: Okay.

THE COURT: Make sense?

MR. LOWREY: I think it does.

THE COURT: Following me?

MR. LOWREY: But I don't think anything about the Alaska Air case.

THE COURT: Well, let's say it's a copycat of the -- and maybe that's an unfair -- that's not a derisive term. It's just a descriptive term. It's asserting the claims on Alaska Air that was asserted individually -- that were asserted an behalf of Alaska Air as an absent class member in this case.

MR. LOWREY: So right now they have no post-settlement damages claim is your point.

THE COURT: Yes. Because there's not a settlement.

MR. LOWREY: Right. That's correct. And so maybe I could save --

THE COURT: My hypothetical is if Home Depot were in that case, your (b)(3) damages claim is going to be based upon what occurred prior to the settlement.

MR. LOWREY: I think that's correct.

THE COURT: Okay. Now, your injunctive relief claims might be a little different, because that's going-forward

relief --

MR. LOWREY: That's correct.

THE COURT: -- that has to take into account a judgment of a court of competent jurisdiction who has put in place a structural relief judgment going forward and the restrictions in the law that exist on your ability to collaterally attack that judgment and go your own way.

What's in between those two things, though, is this category that we've been talking about of (b)(3) divisible relief, of unique individualized injunctive relief that you're seeking on behalf of your client that would be, one, unique to your client and, two, not inconsistent with the judgment as it affects others in the class settlement. Right?

MR. LOWREY: I understand you were describing how the settlement would work if -- if approved, I believe.

THE COURT: Well, I'm not -- I'm actually distinguishing monetary damages --

MR. LOWREY: Right.

THE COURT: -- under (b)(3) that your -- that Home Depot can pursue.

MR. LOWREY: Sure.

THE COURT: And injunctive structural relief under (b)(3) that would be individualized --

MR. LOWREY: Correct.

THE COURT: -- that Home Depot could pursue.

MR. LOWREY: Right. What I -- and let's suppose -- just to add the third wrinkle, let's suppose the settlement is approved, becomes final, I file suit a year or so later. I have damages for both pre- and post-settlement conduct. I also have injunctive relief claims. Obviously, all injunctive relief claims are prospective.

What I don't believe, respectfully, that you have the power to do and what you should not do is make a ruling in this case about what legal standard, per se or rule of reason, is going to govern my damages lawsuit --

THE COURT: I can't disagree with you on that at all.

MR. LOWREY: Perfect. Well, then, that is my concern.

THE COURT: It's not my -- I don't think anything I do here is going to be binding on a -- because otherwise, that -- any ruling I make would affect not just (b)(3) individualized injunctive relief, it could affect (b)(3) monetary damages.

MR. LOWREY: Absolutely, Your Honor. And if I'm suspicious, everyone should accept my apology. But I very much believe that what the Blues would like is a ruling that the per se standard does not govern their going-forward conduct, that they --

THE COURT: Well, why don't we just ask them because they're right here.

You're not going to get in and argue that I've made, by approving a settlement, a legal merits decision on whether this

system, going forward, is per se that would bind an opt-out from litigating that claim in front of Judge Manasco, for example?

MR. ZOTT: What we've said -- and the objectors -- the other objectors agree with this, the Sperling objectors and subscribers -- is you need to decide whether the settlement --

THE COURT: Get close to that microphone, just for the benefit of Risa.

MR. ZOTT: Yeah. You would need --

THE COURT: I can hear you, but I just want to make sure she gets you.

MR. ZOTT: Sorry. You would need to decide whether the go-forward system is per se unlawful or clearly illegal -- we think those are synonymous under *Grunin* and *Robertson* -- or instead, whether it's subject to the default rule of reason. We think you need to make that finding.

If you make that finding, it doesn't mean that it would bind a future judge because you're -- Your Honor, you're not the Eleventh Circuit, with all respect. But it could be cited as precedential value, just like we cite other district court cases, but --

THE COURT: Or persuasive value.

MR. ZOTT: Yeah. Persuasive. And they would be free to argue otherwise. But we do think you need to make a finding in this case. And I'm not going to lie to you. We would argue it.

THE COURT: Well, the finding in this case would be that the going-forward structure is not clearly illegal.

MR. ZOTT: Right. Or per se.

THE COURT: Or per se.

MR. ZOTT: And as, you know, the plaintiffs pointed out, therefore, it's binary. If it's not per se, it's rule of reason. There is no in-between. And then --

THE COURT: But if the objector who opts out or an opt-out who's not even an objector -- let's just say an opt-out --

MR. ZOTT: Yeah.

THE COURT: -- travels into a different case and litigates its Sherman Act rights in that additional case, nothing about the approval of my settlement affects their ability to prove in their individual case a Sherman Act violation; right?

MR. ZOTT: Well, no. Absolutely -- I totally agree. First of all, even if --

THE COURT: Now, there may be some limit on what injunctive relief they can seek.

MR. ZOTT: Right. Right.

THE COURT: For example, nothing would affect them stepping in -- outside this settlement -- into a different case and saying the presettlement structure was a per se violation and we're entitled to money -- treble damages for that reason.

MR. ZOTT: The presettlement structure?

THE COURT: Yes.

MR. ZOTT: Right. I think Your Honor has already -- that's been your ruling up till now, so --

THE COURT: Yes. And you agree with that.

MR. ZOTT: I agree that they could argue that. Yes.

THE COURT: Yes. They've got to prove it --

MR. LOWREY: Right.

MR. ZOTT: Yes.

THE COURT: -- but nothing cuts them off at the pass on asserting that claim.

MR. ZOTT: Right.

THE COURT: All right. So then we get to --

MR. ZOTT: The future.

THE COURT: -- what really is the rubber hitting the road for purposes of the majority of our discussion today, and that is what about structural relief in the settlement approved by a court?

Going forward, nothing prohibits them from seeking individualized injunctive relief, whatever that turns out to be, and arguing that whatever theory they have for that, that we're entitled to this structural -- unique, individualized structural relief because while the court said in In Re Blue Cross Blue Shield Antitrust Litigation that it could not say or that the illegality of the arrangement was not a legal certainty or the

court said it wasn't clearly illegal or the court said for purposes of the classes involved in that case, it wasn't a per se violation, that doesn't limit them from arguing individualized claims for individualized relief departing from that conclusion, does it?

MR. ZOTT: I think as a legal matter, the answer is no. We would -- I won't lie to you. We would cite that opinion and say with all these changes, we think that's persuasive.

THE COURT: You'd say you don't have to follow Proctor --

MR. ZOTT: We think you should.

THE COURT: -- but he's really smart --

MR. ZOTT: Yeah. He's very smart. Exactly.

THE COURT: -- and you should follow Proctor.

MR. ZOTT: That's what we would say.

THE COURT: Okay. Not that --

MR. ZOTT: Not that you're bound by it.

THE COURT: Judge Manasco, you cannot even trod this ground because Proctor has already trod it and it's now a no-pass zone.

MR. ZOTT: I think that's right, Judge.

THE COURT: Does that satisfy you?

MR. LOWREY: Maybe. I'm not exactly --

THE COURT: It should.

MR. LOWREY: Well, I understand. But a lot of words

there, and let me make sure I understand. Because here's my worry. My worry, just to state it, is that, you know, I'm in the (b)(2) class as Your Honor is going to reform it and as you've indicated --

THE COURT: If I approve it, you're in the (b) -- there's not a (b)(2) class right now. There's a preliminary approved (b)(2) class, which you'd be happy to be in at this point.

MR. LOWREY: If you don't approve this, I'm out of your hair. So if you approve it, if you approve a (b)(2) class and you don't let me out, which I know you've said you aren't going to, I believe --

THE COURT: If I approve it, you're right, you're not getting out.

MR. LOWREY: I hear you, Your Honor. I believe that the Blues will take whatever ruling you make in your approval order, whether you say it's not clearly illegal, not per se illegal, whatever you say, and argue that I am bound as a class member --

THE COURT: He just said on the record he's not going to make that argument.

MR. LOWREY: If that is crystal clear in your order. And I don't want to have to be digging out a transcript someday when I file my suit and reading a multi-page colloquy to, you know --

THE COURT: Tell you what. If you would like, you may submit to chambers the three sentences you want in the order that makes that clear.

MR. LOWREY: Now we're talking. Perfect. Thank you.

THE COURT: That doesn't mean I'm going to adopt it, but that means --

MR. LOWREY: You let me get my foot in the door, and you never know what's going to happen.

THE COURT: I'm going to -- but I will not do anything that's inconsistent with that -- that's my commitment to you today -- unless I follow up with more questions and give you an opportunity to respond to them because something didn't occur to me and now, all of the sudden, I've got some questions about what we may or may not have reached agreement on today.

MR. LOWREY: I hear you.

THE COURT: Fair?

MR. LOWREY: You'd give me a chance to reengage.

THE COURT: Absolutely. I don't think I need to hear anything more today. If I do need to hear more, you'll be the second to know, because I'll just tell the special master to hunt you down.

MR. LOWREY: That sounds great. So I'm going to close that folder and open my folder that says second Blue bid. And I don't have a lot to say about this.

THE COURT: Can you hold off on that until I hear

argument on the second Blue bid?

MR. LOWREY: Happy to.

THE COURT: Because I don't think we've done that yet.

MR. LOWREY: Happy to. This has to do --

THE COURT: We've certainly touched and concerned it, but I haven't really had the proponents get up and explain to me what they agreed to, why they agreed to it, and why it's fair, adequate, and reasonable.

MR. LOWREY: Yes, Your Honor. And so all of my remarks have to do with the issue that you've heard pretty substantial debate on, which is what's going to happen now that we're moving second Blue bid to (b)(3). It doesn't have to do with --

THE COURT: Okay. You may address that. I thought you were going to be attacking the whole second-Blue-bid methodology.

MR. LOWREY: No. No, Your Honor. I do think that probably is best deferred. I think that's right.

So first of all, thank you. I mean, it is clear that there is some motion happening here on the second-Blue-bid issue as a result of the Court's involvement, and we appreciate that. And so I just have a few -- I don't even want to call them concerns, just thoughts about, you know, what needs to get worked out. I definitely understand that you're moving the second Blue bid or the second Blue bid is going to move to a (b)(3) class. It may or may not be the same class as the

damages class. We think it --

THE COURT: I think it probably will not if my thinking on the matter stays as it is. It will be a separate (b)(3) divisible injunctive relief class.

MR. LOWREY: And so we absolutely agree, Your Honor. I won't belabor that point. The other thing -- the thing that I can't tell -- and I think I can't tell it because it just hasn't been resolved -- is I can't tell how much of the release is coming with the relief into (b)(3). That was an awkward way of saying this.

THE COURT: You don't know exactly what you're -- you're saying, I don't know exactly what I'm releasing by remaining in the (b)(2) class but getting out and going into the -- and opting out of the (b)(3) class.

MR. LOWREY: That is exactly right. And my real bottom-line plea to you is that whatever it is, let's have it be clear. It can't just be you can seek multiple Blue bids up to the point that it's, you know, inconsistent with the (b)(2) relief. You can't do that to yourself or the judges that come after or to me or to all of the people who will be trying to figure out what that means.

Settlement is compromise. It would be pretty easy just to specify a number of bids. It would be maybe a formula based on where your employees are or something like that that was suggested as well. I don't so much have answers as just the

request that that be clean and clear so I can advise my client and, you know, not be held in contempt when I file my lawsuit because I asked for too many Blue bids. That is really all I wanted to say about that.

THE COURT: I notice you heard that story.

MR. LOWREY: I listened very carefully. Whenever the "contempt" word comes out of a judge's mouth --

THE COURT: Yes.

MR. LOWREY: -- I tend to listen. I've been doing this long enough to --

THE COURT: Well, it wasn't my idea.

MR. LOWREY: I understand.

THE COURT: And believe it or not, magically, the parties all resolved their differences after that ruling came out and I didn't have to hold a contempt hearing.

MR. LOWREY: It is funny how contempt or the threat of contempt --

THE COURT: I will say this. One of the judges -- and I won't say who -- who was on that panel subsequently remarked that he was very surprised that the parties who he thought he had ruled for, the objectors, had filed a motion to reconsider.

And I said, well, you know, the fact that they're no longer just enjoined but now enjoined and going to a contempt hearing might have had something to do with that.

MR. LOWREY: I think that's right. You know, Your

Honor, I had one more thought on second Blue bid. And I don't know --

THE COURT: And that was all after the fact, obviously.

MR. LOWREY: Right. I don't know whether it fits in what you're hearing now, but I think it is because it's more procedural than merits. And it is simply this observation. There isn't a self-insured class representative in our position. So we don't get a second --

THE COURT: What do you mean by "in our position"?

MR. LOWREY: I will tell you. We don't get a second Blue bid because we opted out of the damages class. We would otherwise qualify --

THE COURT: But you're not in that class anymore.

MR. LOWREY: And so if we get a second bid, perhaps this point becomes moot. But -- okay. So maybe I'll -- maybe I'll just table this point until we decide what we're going to do.

THE COURT: And are there not representatives in the class that qualify for a second bid and don't qualify for a second bid, both?

MR. LOWREY: Not that are self-insured, Your Honor.

THE COURT: All right.

MR. LOWREY: They're the ones who get 93 percent of the damages fine. The only, as I understand it, self-insured class rep is Hibbett, and Hibbett is getting a second bid.

And so my point is just this. And this is obviously no cut on Hibbett at all. But there ought to be a class representative that gets the same mix of benefits and losses that we do if we're going to be adequately represented. And so the only self-insured representative is getting a major settlement benefit -- self-described major settlement benefit, as the proponents say, that we don't get. And I think that creates an adequacy problem.

The trade-off that that class representative has made between what he's giving up and what he's keeping is different than the one that we have to make. And, you know, we understand that what you do with the number of Blue bids may moot that argument; but if it doesn't, we make that argument.

THE COURT: Well, let me ask you this. You heard my exchange with counsel for the objectors a moment ago. And do you agree with me that this isn't a question of how many bids you're entitled to, it's just a question of whether the Blues can agree between themselves if you travel to a -- if you opt out of the (b)(3) class and no longer are bound by the structure of who gets two Blue bids and who doesn't, you can assert the claim that the Blues should not be able to agree as it relates to us?

MR. LOWREY: Oh, that's -- and again --

THE COURT: No one else. We're not here on behalf of -- we're not here on behalf of South --

MR. LOWREY: Anyone but Home Depot.

THE COURT: Entity A, entity B, entity C.

MR. LOWREY: Right.

THE COURT: We're here on behalf of Home Depot only. And our complaint is the Blues should not be able to agree among themselves that only one person can give us a Blue bid.

MR. LOWREY: That is correct. And --

THE COURT: Okay. So it doesn't -- we don't get into how many bids that should be. We just get into whether -- in that situation, we get into we've opted out of the (b)(3) class --

MR. LOWREY: Uh-huh.

THE COURT: -- we're pursuing limited injunctive relief, individualized to us, that says we should be able to get however many bids that the Blues decide they want to bid on. And, you know, we have 400,000 employees. You would think a few -- a couple of Blues, anyway, would want to bid on our work if they had that opportunity.

MR. LOWREY: That would be great, Your Honor. I would love the opportunity to be able to make that argument.

THE COURT: But isn't it as simple as that?

MR. LOWREY: Well, I don't think that my colleagues back here are going to say that. I don't --

THE COURT: I'm not asking your colleagues back there.

MR. LOWREY: Well, I mean the settlement proponents.

THE COURT: No. I'm not asking them either.

MR. LOWREY: Fair enough.

THE COURT: I'm asking you.

MR. LOWREY: So it absolutely should be as simple as that. I think I should be able to opt out, pursue individual injunctive relief, and get an order that says you can't agree amongst yourselves how many Blue bids the Home Depot can get. As many people can bid as want to bid, and we're going to have competition. We're going to have an auction for our over 400,000 --

THE COURT: Because before the settlement, that was at least a theory or a claim that you expected class counsel might be pursuing for you; right?

MR. LOWREY: That's correct. And so I ought to be able to --

THE COURT: And if you don't agree with the settlement, whether or not it's fair, adequate, and reasonable, you don't agree with it. You don't want to be that portion of the settlement.

MR. LOWREY: That is correct, Your Honor. And if you -- you know, if I can get out of the release of that claim, if I can pursue my claim for I'll just call it unlimited Blue bids -- and let me be clear. Your point is well taken. I'm not trying to force anyone to give me a bid. That's up to them. All I want it to be is freely competitive. And so if I can

make, in a damages and injunctive relief lawsuit, the claim that I'm entitled to, you know, unlimited Blue bids, whoever wants to bid, I'm a much happier man.

THE COURT: All right. Fair enough. I think I've got your position.

MR. LOWREY: Fair enough.

Let me talk about an issue that hasn't had a lot of discussion yet. And it is a very important issue to my client and it's the one that we led with in our briefing, which is that we don't think that you can and we definitely don't think that you should approve a mandatory (b)(2) settlement that releases claims for future injunctive relief. That was a mouthful.

THE COURT: I think I have your argument, though. Release of future -- related to future conduct?

MR. LOWREY: So I want to talk about that distinction because -- I want to do two things, if it pleases the Court. I want to talk to you about the circuit authority that I believe binds you, and then I want to talk about their effort to distinguish it. Is that acceptable?

THE COURT: Yes.

MR. LOWREY: So the circuit authority that I believe binds you is *Redel's versus General Electric*. Could hardly be too much plainer. Releases may not be executed which absolve a party from liability for future violations of our antitrust laws. The prospective application of a general release to bar

private antitrust action arising from subsequent violations is clearly against public policy.

THE COURT: So forgive me. That's the former Fifth Circuit, which is binding.

MR. LOWREY: Yes, Your Honor.

THE COURT: But I haven't memorized every case recited by the former Fifth Circuit. So was *Redel's* a class action?

MR. LOWREY: *Redel's* was not a class action. I wouldn't expect you to go back to 1974 with your encyclopedic knowledge of the cases. It was not a class action. It was a one-on-one settlement. Now, that fact makes it better for me than if it were a class action, and here's the reason why.

THE COURT: I'm not following you on that, but I can't wait to hear the explanation.

MR. LOWREY: I can tell you exactly that. Even in a one-on-one settlement, it violated public policy for *Redel's* to give up its right to enforce the antitrust laws in the future against General Electric. *Redel's* on steroids would be this case where in a mandatory class, every Blue Cross subscriber is forced to give up their right to seek future injunctive relief. That has a far greater, far more pernicious effect --

THE COURT: How can you have a class settlement that includes structural relief that's enforceable without doing just that?

MR. LOWREY: But you could have a class settlement that

doesn't immunize challenges to going-forward restraints. And --

THE COURT: But if the Court approves the going-forward structural relief, do you have -- let me ask it this way. Do you have a case where a class settlement was put in place under the Sherman Act and a court said that can't bind nonopt-out class members -- whether they could opt out or not, that can't bind them from going back and relitigating the claims that were settled and approved by the court?

MR. LOWREY: And so we need to distinguish between looking-forward claims and claims that existed on the settlement date.

THE COURT: Uh-huh.

MR. LOWREY: *Redel's* makes this distinction. I mean, these are not --

THE COURT: Yes. But that's not a class settlement where --

MR. LOWREY: It's not, but the public policy that's at issue in *Redel's* is the fact that we -- that private enforcement is the hallmark of the federal antitrust regulatory system.

THE COURT: And that's what we have here. We have private enforcement.

MR. LOWREY: You will not have private enforcement of the antitrust law --

THE COURT: I kind of picked on you earlier about Home Depot not showing up until the bottom of the ninth. Guess who

else didn't show up?

MR. LOWREY: The government.

THE COURT: Yes.

MR. LOWREY: And that's why private enforcement is the hallmark of antitrust law. And that's why we don't allow parties to give away their right to enforce it in the future.

THE COURT: How do you distinguish that, though, from a class settlement with structural relief in place -- you know, for example, Baby Bells. Could a consumer have gone in and collaterally attacked the Baby Bell settlement back in the seventies or eighties?

MR. LOWREY: In what sense, Your Honor? I mean --

THE COURT: Say, hey, you're asking me -- the court has put in place a settlement that has structural relief going forward. We're going to break up the Bells; we're going to do X, Y, and Z; and this is going to be a resolution of the antitrust claims filed by the plaintiff class.

Well, what if I am a class member who doesn't like that and I want to -- and I don't think that went far enough?

MR. LOWREY: Right.

THE COURT: And you're -- and you're saying, well, you're asking me to release injunctive relief claims which absolve a party from -- insulate a party from my filing my own lawsuit, which will have the effect of collaterally attacking the settlement.

MR. LOWREY: Well, if -- the point I'm making is that the settlement should never, in the first place, release future antitrust claims. And it's not that we want to collaterally attack --

THE COURT: Well, it's not a matter -- I don't think it's releasing future antitrust claims. It's just saying that the settlement, unless you opt out -- and I understand your distinction under (b)(2), you can't opt out.

MR. LOWREY: Right.

THE COURT: But if the court approves it, it's got to approve it across the board for everyone because you can't have -- it's not a democracy at that point. You can't say 6 percent of the people disagree with the settlement, injunctive relief settlement, and they have the right to go their own way. That would destroy the whole purpose of (b)(2) where the class is being treated the same. That's your typical (b)(2) injunctive relief class.

So I don't think *Redel's* has a lot to say about a 23(b)(2) class settlement that meets the Rule 23(e) requirements for approval.

MR. LOWREY: And so I have to respectfully disagree. Rule 23 is merely a procedural rule. It can't change the same substantive public policy interest that was at issue in *Redel's*. And the court -- the *Redel's* court notes, yes, there are two policies that must be accommodated. The first requires the

greatest respect for private enforcement as the hallmark of the federal antitrust regulatory system. The second policy requires us to respect the amicable settlement and release --

THE COURT: I guess what we're getting into is this. How are you defining "future violation"?

MR. LOWREY: Let's talk about that. This is how --

THE COURT: Because it seems to me that essentially what you're wanting to do in making this argument is to relitigate or separately litigate or differently litigate violations that occurred prior to the settlement -- and that is the structure of these ESAs -- or, alternatively, you're wanting to challenge what the Court may approve as the structural relief that should be in place as part of the settlement.

Now, for example, let's say -- and Mr. Laytin and Mr. Zott are about to cringe when I say this. Let's say that you stuck in. You hung in there. You didn't opt out. And let's say you're entitled to a second Blue bid. And let's say you went from 400,000 to four billion employees and yet, at that point, only one bid came through.

You may have an argument, there they go again, they're conspiring to limit the bids and the business that the Blues can do with me, there's not adequate competition.

That is a separate violation of the Sherman Act. It may be consistent with the settlement in that I have a right to request a second Blue bid, but I didn't get it, and it may be

that that's an additional violation in the future.

I think what *Redel's* says is they can't waive that.

MR. LOWREY: So --

THE COURT: What *Redel's*, I don't think, says, though, is that you can't come in and say, you know, the more I've thought about this, two Blue bids just isn't enough. Even though I didn't opt out, even though I'm part of this injunctive relief class, I'm ready to start litigating to get more than two bids. Okay? I don't think you -- I don't think *Redel's* says you can do that.

MR. LOWREY: I think *Redel's* says that the release -- and I don't mean to get crosswise with you, obviously, Your Honor. I believe that *Redel's* says that prospectively, after the settlement, it's not effective. And I can --

THE COURT: Well, you remember first year of law school with the professor that looked just like you hoped he wouldn't and --

MR. LOWREY: His name was Fear, Your Honor, actually.

THE COURT: Yes. Mine was Durward Jones. And he said, you cannot take a sentence from a -- he used to lecture us about the use of highlighter pens, as if you can highlight two sentences in an opinion and say that's what this case stands for, the proposition. A case can't stand for a proposition beyond the four corners of the case.

MR. LOWREY: I agree, Your Honor.

THE COURT: So that's the first thing I would say is I don't -- if *Redel's* isn't in the class settlement context, I think it's got limited value to our discussion here. Now, there may be a general principle out there that you can't ask somebody to release future antitrust claims.

MR. LOWREY: There is.

THE COURT: I totally get that. And I don't think that's inconsistent with the settlement I'm being asked to approve. But I think if it's fair, adequate, and reasonable, adequately representing class counsel can get with the defendant sued in the class, negotiate a settlement and say, it doesn't matter, woulda shoulda coulda, it matters now what we've agreed to do. And if it passes Rule 23 muster, that's that.

Do I see Judge Putnam back there? All right, folks. Let's all give Judge Putnam a hand.

(Applause and standing ovation)

THE COURT: I don't know if you've been here this morning, but your ears were burning if you weren't. Because we sung your praises. We wouldn't have been at this juncture if it hadn't have been for your extremely diligent and highly skilled work.

JUDGE PUTNAM: Well, thank you, Your Honor.

THE COURT: All right. Now, that doesn't affect whether I'm going to approve this settlement or not, but I think credit is due.

MR. LOWREY: I've got a couple more points I'd like to make on this. And if you still think I'm wrong, I'm not going to keep beating my head against it. But I do have a couple things I want you to think about. Would that --

THE COURT: I'm not sure I'm going to call you wrong. I think I'm going to call you off the mark.

MR. LOWREY: Well, I've been called a lot worse, Your Honor.

First of all, to your point that a case has to be judged within its four corners -- I do make my own graphics sometimes. This is what was at issue in *Redel's*. From 1969 to 1971, allegedly GE engaged in price discrimination. That was the wrong. In March 1969, there was a settlement. And the former Fifth Circuit said everything above this red line is released by the general release in the settlement, including antitrust claims. And the Fifth Circuit said -- the former Fifth, binding Fifth Circuit, says nothing after that is released, period. And that is because of the public policy behind the antitrust laws, reasoning that antitrust violations affect not just the plaintiff, but the entire economy.

So this is a continuing course of conduct. If this were this case, the Blues would say we're doing the same thing here that we were doing here, so that claim is released. And the Fifth Circuit says you can't do that.

Now, let me build on that. You talked about future

antitrust violations. It's important to understand in the eyes of antitrust law what a future violation is. The Eleventh Circuit in *Morton's Market:* Even though the illegal act occurs at a specific point in time, if it inflicts continuing and accumulating harm on a plaintiff, an antitrust violation occurs each time the plaintiff is injured by the act.

Every time we don't get a third, a fourth, a fifth Blue bid --

THE COURT: So let me ask you this.

MR. LOWREY: Yes, Your Honor.

THE COURT: Back to the employment context.

MR. LOWREY: Yes.

THE COURT: You are -- because I think a similar thing is a release in a Title VII context could not abate future violations by the employer; correct?

MR. LOWREY: I don't know, but I'll take your word for it. I certainly hope that's the law.

THE COURT: I mean, it seems like that would be a legal principle that doesn't just apply in the Sherman Act context. Right?

MR. LOWREY: I agree.

THE COURT: So you fire me because I'm over 40.

MR. LOWREY: Right.

THE COURT: And I sue you. And we're on the eve of trial, and we settle the case. You pay me $100,000; you agree

not to disparage me; I release any and all claims against you going forward.

MR. LOWREY: Right.

THE COURT: The next morning I wake up and I come down here and I file a separate lawsuit that says, you know what, I still don't have a job with you. That's another violation.

MR. LOWREY: So the firing violation in your hypothetical occurs entirely before the settlement. I'm not understanding what the violation that occurs after the settlement is.

THE COURT: All right. Let's say it's a pay claim.

MR. LOWREY: Okay.

THE COURT: I say, you paid me less because of my age. We settle. And the next day I come down and say, I'm still getting paid less. I'm still employed with you. We settled my case, but I'm still not getting paid what I deserve to be paid.

MR. LOWREY: Yeah.

THE COURT: You paid me back pay, but it's still because of my age that I'm not where I should be on the pay scale.

MR. LOWREY: So I really -- I really am out of my depth on the employment law stuff. I can tell you I'm not out of my depth on the antitrust stuff. And this is the law for antitrust, which is it is a new violation every time I am injured by a conduct, even if the price-fixing conspiracy was

formed a hundred years ago.

THE COURT: Well, there could never be a settlement.

MR. LOWREY: Well, there can't be a settlement that immunizes defendants' conduct going forward. That's the --

THE COURT: Doesn't -- isn't there required to be a separate and discrete act for a new claim to be brought if it's been released in a settlement, though?

MR. LOWREY: Well, there is a new -- I mean, settlements are driven by their language. And the question is whether --

THE COURT: Now, is *Morton's Market* a settlement case, a case where it was settled and they are asserting claims after the settlement --

MR. LOWREY: No.

THE COURT: -- or is this like a statute of limitations case?

MR. LOWREY: I think it's a statute of limitations case, Your Honor.

THE COURT: That's distinguishable.

MR. LOWREY: Well, it goes to your --

THE COURT: Because the parties haven't knowingly and voluntarily released their rights in the individual context or had a court approve the release of the rights in a class settlement context. So again, I think -- I think you have to read the case in the context of the case.

MR. LOWREY: Well, I'll tell you, I can tell I'm not making progress on the --

THE COURT: You're not.

MR. LOWREY: -- you can't do this. And so I'm --

THE COURT: You preserved all your arguments, though.

MR. LOWREY: -- sharp enough to do that.

I do want to make a slightly different argument, which is that I think you should not, even if you could. It's a different point.

And these are my thoughts on that. And it won't take long. Again, as I said earlier, I have great respect for all the lawyers and parties here, great respect. But if everyone is being honest, everyone should be willing to acknowledge something, which is this. The post-settlement structure would be an untested experiment with unknown, unknowable, and unquantifiable effects on future competition in one of the most important sectors of our economy, which is health care.

THE COURT: Isn't that answered by the fact that I'm going to maintain jurisdiction over the case for at least five years?

MR. LOWREY: So you don't have jurisdiction, for example, to take away the aspects of the settlement structure that the Blues are guaranteed. So, for example, if this goes forward and it's a disaster, hypothetically, you would not have the --

THE COURT: Let's pray that's not the case if it goes forward, but go ahead.

MR. LOWREY: You would not have, for example, the discretion to say, yeah, these ESAs, I know you get those in the settlement agreement, but no, I'm getting rid of them. You can't do stuff like that.

THE COURT: Of course not.

MR. LOWREY: The settlement structure that they want you to lock in, nobody knows how this is going to affect competition.

THE COURT: Well, we have some indications, though.

MR. LOWREY: We have some --

THE COURT: We know, for example, that at least in the laboratory, there are incentives for there to be increased competition in each and every exclusive area. Okay? We know that there will be higher opportunities under the settlement for entities to get a second Blue bid than currently exists; right?

MR. LOWREY: (Nods head)

THE COURT: We know that we are eliminating certain output restrictions that should increase competition. I've gotten declarations, and I take it I'm going to hear some testimony tomorrow that fills in the gaps on some of these things. So it's not like we threw a dart at the board and said we hope this works.

MR. LOWREY: Well, I'm not suggesting that you threw a

dart at the board. I am suggesting this, that no one -- for example, Dr. Mason included -- no one can quantify the improvement. They can say, look, the post-settlement structure is more competitive than the presettlement structure.

THE COURT: Is that or should that even be a standard for approval of a class settlement?

MR. LOWREY: If you are locking in a structure that's going to govern the economy for decades, yes. That's what they're asking you to do.

THE COURT: I think it governs for five years, doesn't it?

MR. LOWREY: No, Your Honor. Five years -- unless I'm dreadfully mistaken, five years is the period in which this special management committee can add things to the release by deciding they are consistent with the injunctive relief. These release of claims that they're asking you to approve, they're perpetual. I can't sue in year six or seven or eight or 20 or 30. They are asking you to make national economic policy for decades.

And this isn't a criticism of you or Dr. Mason. It's just a reflection of the reality that the future is hard to predict.

THE COURT: Well, and this is not a defense for the Blues, the subscribers, the ASO counsel, or anyone who's advocating approval of the settlement, but it is a question in

the back of my mind. I asked you earlier where you were, where your client was.

MR. LOWREY: That's right.

THE COURT: I asked earlier where the FTC was, where the Department of Justice has been. They were all well aware -- the governmental entities that enforce our nation's antitrust laws, they're well aware of this settlement. They've studied it. Right?

MR. LOWREY: Okay.

THE COURT: Would you agree with me?

MR. LOWREY: I don't know, Your Honor. I'm not disputing it, certainly.

THE COURT: You wouldn't disagree with me.

MR. LOWREY: Apparently the Department of Labor has studied it. I don't know who else has looked at it.

THE COURT: Yes. They're going to talk about ERISA, which I don't know if you heard what I said earlier. If somebody had told me that ERISA was going to be an issue, I probably would have turned it down.

MR. LOWREY: No, I laughed at that one too.

THE COURT: But that's not down the main thoroughfare of the Sherman Act, what they're raising. They're raising some things unique to the coverage of ERISA. All right?

So having said that, if dogs and cats were falling from the sky in this one, wouldn't the FTC and DOJ show up and say,

time out, we've got concerns?

MR. LOWREY: I -- I don't know, Your Honor. Evidently -- and I don't know --

THE COURT: And again, that's not a defense --

MR. LOWREY: No. I hear you.

THE COURT: -- but it is a legitimate question; right?

MR. LOWREY: So essentially, what do we know? We know, as Mr. Boies -- and my father also was a history teacher as well, but he gave us the history. And the history is apparently this structure that you ruled is -- and I'm leaving aside the single-entity defense. The structure that you ruled is subject to per se illegality, the summary judgment ruling that you made, evidently that ruling was not enough to gain government attention. So I don't think that you can approve the settlement on the premise that if these were ill- -- if these proved to be long-term, ill-advised restraints on competition, the government will come in and save the day. I don't think so.

And nobody knows, for example, how the green plans things is going to work. Maybe it will work great. If so, maybe we'll never file a lawsuit. But I know that, you know, 96 percent of hospitals and 92 percent of physicians are in Blue plans and that Blue plans are very important.

And so the -- my point to you is that you should not lock in a structure that is indefinite, will last for decades, at a minimum, and you certainly shouldn't do it involuntarily.

It would be one thing if the parties could say, I'm willing to do this bargain, Your Honor, I'm willing to give up -- I'm willing to take that future chance for what I'm getting now. But --

THE COURT: But isn't that completely divorced from the reality of class litigation?

MR. LOWREY: It's not, Your Honor. This phenomenon of setting in place a structure that's going to govern a major section of the economic against private enforcement for decades, that's not classic class litigation. It is -- and, you know, this speaks to the federalist in me and maybe the federalist in you. It is essentially government management of our national economic policy as opposed to competition managing it. You know, the government is saying these restrictions are okay, these aren't, and I've made a decision and it can't be undone.

That's the end of my pitch on that, Your Honor. Obviously, happy to answer any questions you may have on any of this.

THE COURT: I appreciate your remarks.

MR. LOWREY: Thank you, Your Honor.

THE COURT: Okay. We've got another 30 minutes or so.

MR. SMITH: Good afternoon, Your Honor.

THE COURT: I guess that means you're up next.

MR. SMITH: Well, I'm actually hoping to pave the way for Mr. Isaacson. So, Your Honor, just so you understand what

remains to be done on the second Blue bid -- and I just don't think we're going to get it done this afternoon.

THE COURT: I think you're right.

MR. SMITH: Okay. So there's probably going to be some brief --

(Off-the-record discussion)

MR. SMITH: Your Honor, there's -- as Mr. Zott --

THE COURT: We can all arm wrestle.

MR. SMITH: As Mr. Zott was just, frankly, pointing out to me, there's a lot still to be done on second Blue bid, so there needs to be some reply to Mr. Slater and Mr. Lowrey. There's probably some more explanation of how we got there from Mr. Hausfeld. There's finishing the discussion about moving the divisible relief over to (b)(3). And then finally, there's the Taft-Hartley and the church plan. We just can't -- we can't get that done today.

THE COURT: We'll get it done tomorrow.

MR. SMITH: Right. And so what I wanted to suggest is there a divisible piece that I think we could get done this afternoon by your 5:30.

THE COURT: I'm all for that.

MR. SMITH: Okay. And that's why I'd like to introduce Mr. Isaacson to talk about that divisible -- no pun intended -- piece, which is the attorneys' fees, and reserving all rights to the Blues and to everyone else on finishing those

second-Blue-bid issues tomorrow.

THE COURT: Yes. I realize we haven't actually started the discussion of the merits of the second Blue bid. We've been talking about what do opt-out rights look like vis-a-vis second Blue bid or additional bids.

MR. SMITH: Correct. And some of those will benefit from discussion between now and tomorrow morning.

THE COURT: Right.

All right. Welcome back. Do you need something from him?

MR. ISAACSON: Thank you, Your Honor. No, from my colleague, Hamish.

THE COURT: Okay.

MR. ISAACSON: Have you got the --

It's nice to fall under the word "divisible." It seems to be the word of the day.

THE COURT: "Divisible" has created some divisions today.

MR. ISAACSON: Yes. But let me get started and then hopefully he'll catch up and put the slides on the screen. There we go.

No. The slides for attorneys' fees that you have been emailed. Maybe Swathi can help Hamish. I'm not going to be talking about arbitration clauses.

(Brief pause)

MR. ISAACSON: So as the Court knows, the request for fees is for $626,583,372 and then close to $41 million in expenses. We believe this -- even though this is a lot of money, we believe this meets the reasonableness standard. And you've heard a lot of the reasons today because of the complex, protected litigation.

I'm happy to be speaking to this issue because we've talked about history a couple times today. And at the beginning of this history, which is now almost ten years ago, we would have been extraordinarily proud -- and are extraordinarily proud -- of this result both in terms of monetary relief and injunctive relief.

In listening to today, you heard certain objections to burdening the opt-out rights, which sound like that they have been mitigated because of the fact that now we're just talking about clarifying that. There's also an objection to allocation, which you're going to hear about tomorrow. That doesn't go to the fees or the reasonableness of the settlement.

What there are in terms of the fees overlapping with objections to the settlement is you should have done better. You should have gotten more or perhaps done it for less money. And those don't meet the standards for an objection in this case.

I thought Mr. Lowrey was interesting in saying he doesn't want any uncertainty over the next five years. If you

want uncertainty over the next five years, the best way to do that is for this litigation to continue without a settlement, because we've been doing this for ten years and it's required $40 million of investment of expenses, $200 million of attorney time, all to lead to this result.

And when the objections come to you, both to the fees, you're not hearing comparisons. You're not hearing, well, look, here's what was done in this case or, even, more importantly, what usually gets done. This is not fair because usually, someone does better. Instead, what the record reflects is this is an extraordinary result, not merely a reasonable result. And they're saying why couldn't you have just done a little bit more and then would throw us into the process of years and years of litigation across many states.

The -- moving to the next, if we could, Hamish. Or do I have the clicker? Do you want me to do the clicker? Excellent.

You've got a lot of clarity in the law in this circuit about attorneys' fees. And the objectors -- the objections really, by and large, are taking issue with the benchmarks in the Eleventh Circuit. This is, you know, 20 to 30 percent, 25 percent in the middle, and we are doing -- we are below 25 percent. The Eleventh Circuit has given this guidance over and over again, and we have followed that in this case. The numbers are there, 23.47 percent of the common fund. That's attributing

no value to the injunctive relief.

We've also presented a record to show you how this compares to other cases through two professors --

THE COURT: It would have created an interesting question if you were saying the common fund should include injunctive relief, but you're not taking that position.

MR. ISAACSON: We are not. One of the factors -- one of the benefactors, I think, does take that into account, and I'll mention that. But purely mathematically, if we had achieved no injunctive relief, this would have been a standard fee within -- under the Eleventh Circuit guidelines. The --

THE COURT: Slightly under the benchmark.

MR. ISAACSON: Yes. Yes. And -- well, at this number, slightly under, but it's more than 1 percent under. And each point matters when you're starting with 25 points.

You know, Professor Fitzpatrick did an analysis of 35 class action cases in the Eleventh Circuit and found that the median -- average and median fees awarded in those cases were 28 to 30 percent, so the higher end of the range that the Eleventh Circuit permits.

Professor Silver analyzed 62 so-called megafund cases, and which -- all of which the attorney fee percentage awarded was over 23.5 percent. And courts nationwide have repeatedly awarded fees of 30 percent or higher in so-called megafund settlements.

(Brief interruption)

THE COURT: There's some feedback on Zoom, for some reason. I'm going to ask everyone to mute if you're on the phone. Or if you're on Zoom, please mute.

Go ahead.

MR. ISAACSON: And that statement I just read is not from an expert. That's from the Eleventh Circuit. Well, I guess, in a way, it's from an expert, but it establishes the reasonability of the fees in this case.

Professor Silver has a chart where he goes through all of these cases, showing in the so-called megafund cases that the results are similar to what you get in this case. And then he also explains what's wrong with the notion that you should have a sliding scale the higher you get. In fact, none of these big companies that have come before you would enter such an arrangement because it means that they would incent their lawyers to accept lower settlements where they get a higher percentage fee. And there's examples that have been given. So you're going to have bad results if you have a 25 percent fee for up to a hundred million dollars, but 20 percent at $200 million. Then someone is going to want to settle at a hundred million dollars or slightly below and not settle for 125- or even up to $140 million.

So the *Johnson* factors are outlined there, and I'll walk through those briefly. They are optional in the Eleventh

Circuit. But given what's at issue here, we expect that the Court will walk through them. But --

THE COURT: Let me ask you this. Do you have a copy of these slides?

MR. ISAACSON: I do. And we will give them to you.

THE COURT: You'll supply that?

MR. ISAACSON: Yes. The --

THE COURT: Do you have one now?

MR. ISAACSON: Apparently the answer is yes.

THE COURT: It's been helpful for me to have a copy so I could take notes on them.

MR. ISAACSON: Yes.

(Brief pause)

THE COURT: All right. Please continue.

MR. ISAACSON: And basically, what happens is if you walk through the *Johnson* factors, they become a pitch for us getting something higher than the benchmark. They are all factors for elevating above the benchmark, which is not what we're seeking in this case.

But when you walk through them, the first factor is the degree of success. And this is where the *Johnson* factors say, well, what else did you achieve besides just money? So they allow you to incorporate the concept of injunctive relief. And here you have historic injunctive relief, which is the whole reason for having this factor. And it's part of the degree of

success that was obtained here.

And then a *Johnson* factor is what is the monetary relief. Professor Silver explains that this fund, as of the 2019 reporter, is the largest in the history of antitrust litigation and more than $300 million larger than its closest rival.

Dr. Pakes submitted a report saying that we've recovered somewhere between 7 to 14 percent of our estimated maximum potential recoveries.

Now, it's always interesting that you present these percentages based on what the plaintiffs would have projected as damages because of course the defendants would not have agreed to these numbers. And I think they review this as many multiples times the amount of damages that the defendants would have expected us to recover. And if you do something like a median, these percentages become much higher. But even based on us winning everything that Dr. Pakes would have estimated, this is a result that's supported by the case law. And as the Court knows, this is not a settlement where any money is going to revert to the defendants. This money is going to the class.

I've talked about -- and we've talked about today -- the transformative injunctive relief. Dr. Rubinfeld's declaration explains that this forward-looking relief opens up competition amongst substantial entities in the enormous health insurance market, stands as economically significant by itself.

Professor Fitzpatrick has an interesting way of looking at it, and I think it's an appropriate way to look at it, and it's not a way that you get from the objectors. What is your decision tree? And if you had a decision tree that began from the beginning of this case some ten -- almost ten years ago and multiplied the probability of success and all the outstanding issues and then go through the probability of losing on appeal and all the legal issues, it's not difficult to conclude, he says, that the cash portion of the settlement is, by itself, a good outcome for the class. But in light of the injunctive relief also won by class counsel, it's not difficult to conclude the outcome here is beyond good. It is excellent.

And that's not a decision-tree analysis. You don't get a decision-tree analysis from objectors saying if we go forward, here's the decision tree about when we achieve more, how we achieve more, or at what cost. We know it would be a lot because of what we have had to incur.

Again, one of the *Johnson* factors is that there are difficult factual issues and complex questions of law. And in -- antitrust cases are notorious for that. This Court knows the complexity of this case. And Professor Fitzpatrick has found that nearly 80 percent of awards in antitrust cases were equal to or greater than 25 percent.

One of the *Johnson* factors is substantial discovery. We've talked about how many terabytes of data and documents. We

have had three dozen competitors at issue here, and we had history going back to the 1930s.

And then we have the enormous efforts that were expended here: 434,000 hours, 40 million -- almost $41 million in expenses. And as Professor Fitzpatrick says, this is more of an upfront investment than in all but one billion-dollar class actions cases, all but one. And I say to you if we had a meeting back before we filed this case --

THE COURT: It would have been the same effect as mentioning ERISA to me.

MR. ISAACSON: Right. Right.

-- and those of us who were there at the beginning had explained to our firms this is going to cost $40 million over the next eight years and we're going to put 434,000 hours into this and we didn't know the results, this courtroom would be a lot emptier today and there would be fewer people on the phone willing to take that risk.

This is the definition of taking risk. And part of that risk is if we had said -- we've talked about the quality of the plaintiff counsel. We mentioned the quality of defense counsel. But this is quite a group of lawyers that have been against us for all these years, and that's part of the assessment of risk, that these types of firms were going to come in to oppose us.

THE COURT: But just think of the friendships that have

been formed.

MR. ISAACSON: And as cases go on for ten years, lives change. People have retired. There are some friendships -- friends I don't know where they are, and others of us had changes during this time period. So the point is the group of lawyers before you took on a huge risk and have continued to take on that risk during the history of this case. And that risk is what justifies a benchmark fee.

Professor Silver said, my review of the preliminary approval materials convinces me that the risks inherent in this litigation were severe. They included challenges to the plaintiffs' damages model, a difficult path to class certification, the prospect of having to certify classes in multiple states, the difficulty of proving damages if their model was accepted, the absence of a preceding or contemporaneous governmental investigation, and many others.

We undertook what was not just an antitrust case but a challenge to a business model, which, by definition, is harder to resolve.

And so as I've said, I believe few attorneys would have been willing to have taken this on if they had known exactly what was coming. And we are proud of the result and proud that we did undertake this and achieve this result.

All of this would favor an upward adjustment from 25 percent, but we are not seeking that and we're not even seeking

quite 25 percent.

The lodestar cross-check is sometimes used. It's not always economically rational, but it really -- it doesn't change anything in this case. Because when you do that check, you're getting a multiplier of approximately 3.2. And Professor Silver has looked at that and confirmed the reasonableness by comparing it to others' cases and comparing it to the risks of this case, and that includes a blended hourly rate of $447.

And in looking at the lodestar cross-check, you also have to remember that the $200 million in fees is using historical rates. They haven't been brought up to the current date. And the converse of that is we -- that any fee that has been paid has been waiting for almost a decade and after an investment of $40 million in hard cash and an investment of $200 million in our time, all to achieve this forward-looking result both in economics and in injunctive relief.

And we've talked about the -- we've cited in our papers the cases that -- that support this type of multiplier and higher multipliers. The clear-sailing agreement has been mentioned in the papers by the objector -- by some of the objectors. And the case law on that is fairly -- is clear that the clear-sailing clauses are valid as long as there's no lack of collusion in this case. And I don't think -- I've not actually been involved in a settlement involving collusion, but this would be as far away from one as you could possibly get.

And you have our expenses, which I've mentioned. And I'm not going to walk through the objections because basically, the objections -- I've responded to the objections at this point. The objections are questioning providing us the benchmark fee given the results that have been obtained and saying that the amount of money that should be awarded should be less, which is not supported by the success of the case, both in terms of the economics and the injunctive relief, and by the standards of the Eleventh Circuit.

So unless you have any questions, Your Honor --

THE COURT: I do not at this point.

Anyone want to speak briefly? Mr. Cooper?

MR. BURNS: Your Honor, if I may, would you like to hear brief argument on adequacy of counsel?

THE COURT: Actually, I was just wondering if there was anyone who wants to speak to fees and expenses.

MR. BURNS: I'm sorry.

THE COURT: That's what I was -- and I didn't complete that thought. I should have. Anyone want to be heard on fees and expenses? Yes?

MR. BEHENNA: Your Honor, my name is David Behenna, and I'm one of the objectors to the fee application. And I was scheduled for tomorrow, so I'd ask that -- if I could respond at that time.

THE COURT: Well, can you give me a summary of what

your concerns are?

MR. BEHENNA: Well, I guess the first question I have, Your Honor, is did you receive a copy of my written objection?

THE COURT: I believe I did.

MR. BEHENNA: Okay. Well, I think to begin with, as I mentioned, I'm David Behenna, and I'm a class member. I'm representing myself pro se.

The reason I'm objecting to the fee application primarily has to do with the fact that I believe you should start with the lodestar approach. This is a statutory fee-shifting case brought under the statutes.

THE COURT: But it created a common fund, did it not?

MR. BEHENNA: Well, my understanding, sir, is under Supreme Court guidance, that under fee-shifting statutes, there are certain cites where you should start -- a reasonable fee starts with lodestar. Now, it can be enhanced based on the performance, including the *Johnson* factors. But given the performance and some other issues I have I believe it was Mr. Isaacson that pointed some things out that I made some notes on.

I did not get a -- just as a side note, I did not get a reply to my objection, so the first I'm hearing a response is in this courtroom a few minutes ago. So that's one of the reasons I would appreciate --

THE COURT: That's typically how it works, though. You

make an objection, you assert your objection to the Court, and the other parties propose and then respond to your objection.

MR. BEHENNA: Okay. So just coming back to it, it's my belief on prior precedence that the -- on fee-shifting statutes, whether or not a fund is created, the analysis -- the Court's analysis begins with the lodestar and whether the performance deserves --

THE COURT: What do you say to what was actually my case, *Faught versus American Home Shield,* where the Eleventh Circuit intimated that if the fee falls within the benchmark range in a common fund settlement, the Court need not use the factors discussed in *Johnson* to cross-check it?

MR. BEHENNA: Well, I had seen the cite that the Eleventh Circuit has historically used, and I don't believe that's a fee-shifting -- that case was brought under a fee-shifting statute approved by -- you know, this is, again, congressionally approved law.

THE COURT: Okay.

MR. BEHENNA: So -- so I -- one of the things I was going to point out -- and again, it would be interesting. I had read through the preliminary -- the papers filed for the preliminary approvement -- approvement of the settlement. And I looked at the exhibits that were referenced by Mr. Isaacson, including Professor -- I believe it was Fitzpatrick and Silver, and I came to a different conclusion in my objection as to what

a good benchmark is in mega cases. So, you know, one of the issues is I need to see, for example, whether that chart that Mr. Isaacson produced today --

THE COURT: Do you have any Eleventh Circuit case law that would support your position on what the appropriate benchmark is in what you would call a mega case? And I think this probably would qualify, whatever definition we apply, as a mega case.

MR. BEHENNA: Sorry. In the Eleventh Circuit?

THE COURT: Yes.

MR. BEHENNA: No, sir. I was just -- all I looked at were the cases that Fitzpatrick cited in his declaration that I believe ran for the last 20 years, and they were all over a billion dollars. Those were the mega cases I saw in the papers provided by plaintiffs' counsel. And that 20-year range, I believe, came after the Eleventh-Circuit-referenced case that I believe was in the late nineties.

THE COURT: Even if the *Johnson* factors apply here, how would you contend we should apply the *Johnson* factors, given the risks undertaken by plaintiffs' counsel in this case?

MR. BEHENNA: Well, again, I may be addressing this indirectly. But my understanding is under Supreme Court precedent in -- it may have been *Hensley* -- I'd have to check another reference. The comment in one of the cases -- in that case, I believe, was that contingency is not a factor. Risk is

not a factor in fee enhancement.

THE COURT: Well --

MR. BEHENNA: And I believe it's --

THE COURT: -- do you think those cases have overruled *Johnson*?

MR. BEHENNA: Well, *Johnson* -- I believe *Hensley* or *Alyeska* referenced some of the *Johnson* factors, but what they focused on there was actually success. And in terms of -- there were a number -- Mr. Isaacson went through a number of factors. But a number of those factors, honestly, I think are subsumed in the average hourly rate, which I noted was about $450 per hour, and also subsumed in the number of hours, which was 434,000 hours, which I believe was referenced.

THE COURT: What do you --

MR. BEHENNA: And I believe the Supreme Court focused on the results.

THE COURT: What do you make of the fact that the benchmark applied to the common fund here was only related to the monetary value of the settlement and not even calculating in what I think, if approved, would be the more valuable aspect of the settlement, and that is the nonmonetary, structural relief?

MR. BEHENNA: Well, I -- my understanding is that any sort of injunctive relief is speculative. And counsel for the Home Depot mentioned that. Alaska Air -- the counsel that was representing Alaska Air also mentioned that. So when it comes

to the injunctive relief side, I --

THE COURT: Well, it's not --

MR. BEHENNA: There's no -- in other words, there's no -- I'm sorry.

THE COURT: We're not speculating to say that it's going to increase the level of competition. It does away with national best efforts, which Mr. Boies said he identified as even more pernicious than the exclusive service areas early in the case. He told me that early in the case.

I guess the question is there -- undoubtedly, there's some value to the injunctive relief. You're not suggesting that otherwise, are you?

MR. BEHENNA: Well, I don't know what the value -- honestly, because if plaintiffs have not presented quantitative evidence, I don't believe the evidence -- there's evidence that it has value. So it hasn't been quantified. So my -- as I --

THE COURT: Well, I'm not asking if it's been quantified. I'm saying are you saying there's no value?

MR. BEHENNA: I don't know. I don't know what's going to happen in the future with, you know, other competition in these markets. I don't know.

THE COURT: All right.

MR. BEHENNA: The fact that it wasn't quantified, to me, is a major issue.

THE COURT: All right. Anything else?

MR. BEHENNA: So -- yes. I just would also like to point out in terms of why this is a fee -- evidence in the record that this is a fee-shifting case is that under the preliminary approval --

THE COURT: Let me ask you this. Are you wanting to still reserve some time tomorrow to address some things?

MR. BEHENNA: Yes.

THE COURT: Then this would be the appropriate time for you to take leave to do that.

MR. BEHENNA: Thank you, Your Honor.

THE COURT: We're at 5:30, almost right at 5:30.

Okay. So we'll resume tomorrow at nine a.m. We will suspend discussion of fees and expenses and put on the experts straightaway; right?

MR. BURNS: Yes, Your Honor.

THE COURT: And then we will resume this discussion, second Blue bids, and whatever else the parties would like to discuss tomorrow with me and the objectors would like to discuss with me tomorrow.

Let me just say this. We have a day left. Govern yourselves accordingly. But never fear. I have a feeling I'm going to be requiring posthearing submissions. So if there's something that you're just dying to say tomorrow and you don't quite get the opportunity to say it, something tells me you're going to get the opportunity. All right?

If there's nothing further, we'll be in recess until nine a.m. in the morning.

MR. BOIES: Thank you, Your Honor.

(Proceedings concluded at 5:30 p.m.)

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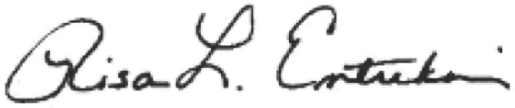
COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

This 3rd day of November, 2021.



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